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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 289.

JAMES H. BEATTY, HENRY BEATTY, WILLIAM BEATTY AND JOHN D. BEATTY, CLAIMANTS OF THE STEAMER "MANITOBA," APPELLANTS,

vs.

HOWARD MELVILLE HANNA AND GEORGE W. CHAPIN, OWNERS OF THE PROPELLER "COMET."

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

FILED SEPTEMBER 8, 1884.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 *On Libel and Cross-Libel for Collision.*

In the Circuit Court of the United States, Eastern District of Michigan.

HOWARD MELVILLE HANNA and GEORGE W. CHAPIN, Owners of the Propeller Comet,

vs.

THE STEAMER MANITOBA

and

JAMES H. BEATTY, HENRY BEATTY, JOHN D. BEATTY, Claimants and Owners of the Steamer Manitoba,

vs.

THE PROPELLER COMET.

On appeal in admiralty.

The above-named James H. Beatty, Henry Beatty, and John D. Beatty, claimants of the steamer Manitoba and the libellants named in the cross-libel against the said Propeller Comet, conceiving themselves aggrieved by the final decree of this court made on the 18th day of March, A. D. 1884, in the above-entitled cause, hereby appeal therefrom and from so much thereof as adjudges and decrees the said Steamer Manitoba to be in fault for the collision set forth in said original libel, and also from so much of said decree as awards to the said original libellants, Hanna and Chapin, the sum of thirty-two thousand and ninety and $\frac{45}{100}$ dollars ($32,090.45), without any deduction or allowance therefrom to these appellants on account of injuries occasioned by said collision to the said steamer Manitoba.

And these appellants propose to prosecute their said appeal to the Supreme Court of the United States and pray that the said appellate court may reverse the decree of the above-entitled court so far as it adjudges and decrees the said Steamer Manitoba, her officers and crew, to be in fault for said collision, and prays that the amount of the damages suffered by the said steamer Manitoba by the collision with the said propeller Comet, to wit, the sum of five thousand dollars ($5,000), and interest thereon from the time of said collision, as claimed in the cross-libel, shall be adjudged payable to these appellants, together with costs of suit, and that the libel of the said Howard Melville Hanna and George W. Chapin be dismissed, with costs of suit in all of the courts, to be taxed.

March 18, 1884.

MOORE & CANFIELD,
Proctors for Claimants of Manitoba and Appellants.

Endorsed: 6811. Circuit court of the U. S., eastern dist. of Mich. In admiralty. Howard Melville Hanna *et al. vs.* Steamer Manitoba. Appeal. Filed in clerk's office March 26, 1884. Walter S. Harsha, clerk.

In the Circuit Court of the United States for the Eastern District of Michigan.

HOWARD MELVILLE HANNA and GEORGE W. CHAPIN, Owners of the Propeller Comet,

vs.

THE STEAMER MANITOBA

and

JAMES H. BEATTY, HENRY BEATTY, and JOHN D. BEATTY, Survivors of Themselves and William Beatty, Claimants and Owners of the Steamer Manitoba,

vs.

THE PROPELLER COMET.

On appeal in admiralty.

Know all men by these presents that we, James H. Beatty, of Toronto; Henry Beatty, of Thorold, and John D. Beatty, of Sarnia, all of the Province of Ontario and the Dominion of Canada, are held and firmly bound unto Howard Melville Hanna and George W. Chapin, libellants in the above-entitled cause, in the sum of forty thousand dollars ($40,000), to be paid to the said Howard Melville Hanna and George W. Chapin, their heirs or assigns; for which amount, well and truly to be made, we bind ourselves, and each of us, our and each of [our] heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 26th day of March, A. D. 1884.

Whereas the above-named James H. Beatty, Henry Beatty, and John D. Beatty have prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled cause by the circuit court of the United States for the eastern district of Michigan:

Now, therefore, the condition of this obligation is such that if the above-bounden James H. Beatty, Henry Beatty, and John D. Beatty shall prosecute their said appeal to effect and answer all damages and costs if they shall fail to make their appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JAMES H. BEATTY. [SEAL.]
HENRY BEATTY,
By JOHN D BEATTY, [SEAL.]
Att'y-in-Fact.
JNO. D. BEATTY. [SEAL.]

Signed, sealed, and delivered in presence of—

____ ____.

3 STATE AND EASTERN DISTRICT OF MICHIGAN, } ss:
Wayne County, }

James H. Beatty, being by me duly sworn, deposes and says that he resides at the city of Toronto, in the Province of Ontario and Dominion of Canada; that he is one of the appellants in the foregoing entitled suit, and one of the obligors named in the foregoing bond; that he is worth the sum of one hundred thousand dollars and upwards over and above all his debts and liabilities which is subject to execution in the said Province of Ontario; that he has deposited with the judge and clerk of the above-entitled court a certificate of deposit, issued on the 22d instant by the bank of Montreal, payable to him, deponent, for the sum of twenty-two thousand three hundred dollars; that said certificate is number 83429, which deposit he has made as security for him as one of the makers of said bond.

JAMES H. BEATTY.

Subscribed & sworn to before me, at Detroit, this 26th day of March, A. D. 1884.

WALTER S. HARSHA,
Clerk U. S. Circuit Court, East. Dist. of Mich.

STATE AND EASTERN DISTRICT OF MICHIGAN, } ss:
Wayne County, }

John D. Beatty, being by me duly sworn, deposes and says that he is one of the obligors named in the foregoing bond, and appellants in the foregoing suit; that he resides at Sarnia, in the Province of Ontario and Dominion of Canada; that he is worth the sum of thirty thousand dollars and upwards over and above all his debts and liabilities which is subject to execution in the said Province of Ontario; that he has deposited with the judge and clerk of the above-entitled court a certificate of deposit, issued by the Canadian Bank of Commerce, dated March 22d, 1884, numbered 31741, issued to the said deponent for the sum of four thousand four hundred and forty-three dollars, which certificate he has deposited as security for the performance of the conditions by him to be performed in the foregoing bond.

JNO. D. BEATTY.

Subscribed & sworn to before me, at Detroit, this 26th day of March, A. D. 1884.

WALTER S. HARSHA,
Clerk U. S. Circuit Court, East. Dist. of Mich.

4 STATE AND EASTERN DISTRICT OF MICHIGAN, } ss:
Wayne County, }

John D. Beatty, being duly sworn, says that he is one of the obligors named in the foregoing bond; that he is in business with Henry Beatty, another of said obligors; that deponent has knowledge of the property and financial condition of the said Henry Beatty, who

is now at Port Colborne, in the Dominion of Canada; that the said Henry Beatty was interested in the steamer Manitoba, and in the decree referred to in said bond, and that deponent has a power of attorney from the said Henry Beatty to act for him in the signing of said bond; that the said Henry Beatty, in the best judgment of deponent, is worth and has property in the Dominion of Canada subject to execution over and above all the debts and liabilities of the said Henry Beatty in the sum of at least one hundred thousand dollars ($100,000); that the said Henry Beatty has deposited with the judge and clerk of the above-entitled court a certificate of deposit, issued by the Canadian Bank of Commerce, dated March 26, 1884, numbered 55084, to him, the said Henry Beatty, for the sum of thirteen thousand three hundred and thirty-four — ($13,334), which certificate deponent has deposited as security for the performance of the conditions of the bond to be performed by him, the said Henry Beatty.

JOHN D. BEATTY.

Subscribed & sworn to before me this 28th day of March, A. D. 1884.

WALTER S. HARSHA,
Clerk U. S. Circuit Court, East. Dist. of Mich.

Approved.

H. B. BROWN,
Dist. Judge.

Endorsed: 6811. Circuit court of the U. S., eastern dist. of Mich. In admiralty. Howard Melville Hanna *et al. vs.* Steamer "Manitoba." Appeal bond, $40,000. Filed in clerk's office March 28, 1884. Walter S. Harsha, clerk.

5 To the honorable the judge of the district court of the United States for the eastern district of Michigan:

The libel of Howard Melville Hanna & George W. Chapin, of the city of Cleveland in the State of Ohio, against the Steamboat Manitoba, her boats, tackle, apparel, and furniture, and against all persons lawfully intervening for their interests therein in a cause of collision, civil and maritime.

And thereupon the said libellants do allege and propound as follows:

First. That your libellants, at the time when the cause of action hereinafter stated arose, were the owners of the propeller Comet, which said propeller, as well as the aforesaid Manitoba, were vessels of twenty tons burthen and upwards, enrolled and licensed for the coasting trade and employed in the business of commerce and navigation between ports and places in different States and Territories upon the lakes and navigable waters connecting said lakes within the true meaning and intent of the act of Congress.

Second. That on the 26th day of August, 1875, the said propeller Comet, being then and also at the time of the collision hereinafter

mentioned tight, staunch, strong, and in every respect well manned, tackled, apparelled, and appointed, and having the usual and necessary complement of officers and men stationed at their proper posts and upon the lookout for the protection and safety of said vessel, was bound on a voyage from Grand Island, Lake Superior, for the port of Cleveland, Ohio, and Buffalo, New York, with a cargo of pig-iron, copper ore, silver ore, and fifty-three sacks of wool, owned by various parties, but being carried for hire to be thereafter paid from said ports of departure to said ports of destination. Not long after eight o'clock in the evening of said 26th day of August, after rounding White Fish Point, Lake Superior, — made the white light of a steamboat which proved to be the said Manitoba, and shortly after the red light of said steamboat off the port bow of said propeller Comet and seen at the distance that ordinary lights on such a steamboat would be seen on such a night, it being clear; that at the time of making said white light and thence until the collision hereinafter mentioned the proper officers and crew of said propeller were on deck in their proper places, vigilantly observing said approaching steamboat, which was bound up the lake on a course opposite or nearly opposite to that of the Comet; that the Comet proceeded on her course holding said red light off her port bow, and by a proper porting of her helm, by a proper single blast of her whistle, and by stopping her engine did all that the law and good seamanship required her to do or that was possible for her to do to avoid said steamboat, but that said steamboat, although the signal and proper lights of said propeller were brightly burning in their proper places and plainly visible for miles to said steamboat and indicating together with said whistle that she should pass said propeller to the right, as in law she was bound to do, yet the said steamboat and her officers, disregarding their duties in that behalf, instead of parting and taking other measures to avoid said Comet, took no measures to avoid her; but, on the contrary, starboarded her
6 wheel and with great force ran into said Comet on her port bow, about fifteen or twenty feet abaft the stem, cutting her down to below her water line, and sinking her in less than two minutes in such depth of water as to make said Comet and her cargo irrecoverable and therefore a total loss, and destroying the lives of eleven men.

Third. That the damage to said libellants by said sinking was not less than thirty thousand dollars in the loss of said propeller, that being the value thereof, and in five thousand one hundred and twenty-five dollars freight and charges which said libellants had on said cargo, and that said cargo was worth not less than thirty-five thousand dollars, for which amounts, making in all the sum of seventy thousand one hundred and twenty-five dollars ($70,125), libellants claim that they have a lien upon said steamboat enforceable in this cause for themselves and the owners of said cargo in this honorable court.

Fourth. That the aforesaid collision was occasioned solely by the negligence and unskillfulness of the persons navigating said steamboat in not having proper officers and men on duty and at their

posts, in not porting, signaling, answering signals, or stopping engine, and in starboarding and running into and upon said propeller, and by said omissions of duty and other omissions of duty, and by said and other wrong movements and misconduct, solely causing said collision, and making it inevitable by any conduct, vigilance, or effort on the part of those in charge of the propeller.

Fifth. That all and singular the premises are true and within the admiralty jurisdiction of this honorable court, and that the said steamboat is lying at the port of Detroit, in said district.

Wherefore libellants pray that process in due form of law in cases of admiralty and maritime jurisdiction may issue against the said Steamboat Manitoba, her boats, tackle, apparel, and furniture, and that all persons having any interest therein may be cited to appear and answer all and singular the matters aforesaid, and that this honorable court will be pleased to decree the payment of the damages aforesaid, amounting to seventy thousand one hundred and twenty-five dollars ($70,125), with costs, and that the said vessel may be condemned and sold to pay the same, and that your libellants may have such other and further relief as in law and justice they are entitled to receive.

H. MELVILLE HANNA.
GEO. W. CHAPIN.

WILLEY, TERRELL & SHERMAN,
Proctors for Libellants.

7 EASTERN DISTRICT OF MICHIGAN, *ss:*

Be it remembered that on this fourth day of August, A. D. 1875, before me, a United States commissioner for said district, personally appeared L. M. Schwan, and made solemn oath that he is the agent of the libellants named in the foregoing libel; that he has heard read the foregoing libel and knows the contents thereof, and that the same is true as to his own knowledge, except as to those matters and things stated to be on his information and belief, and as to those matters and things he believes it to be true.

D. J. DAVISON,
U. S. Comm., East. Dist. Mich.

Filed Sept. 4, 1875.

D. J. DAVISON, *Clerk.*

8 District Court of the United States for the Eastern District of Michigan, *ss:*

The President of the United States of America to the marshal of the eastern district of Michigan, Greeting:

Whereas a libel hath been filed in the said district court of the United States for the eastern district of Michigan, on the fourth day of September, in the year of our Lord one thousand eight hundred and seventy-five, by Howard M. Hanna and Geo. W. Chapin, against the Steamboat Manitoba, her engine, machinery, &c., claiming there

is due them for damages to their propeller Comet by reason of said steamboat having run into and collided with said propeller on August 26, 1875, near White Fish Point, Lake Superior, the sum of seventy thousand one hundred and twenty-five dollars ($70,125), for the reasons and causes in the said libel alleged and mentioned, and praying the usual process and monition of the said court in that behalf be made, and that all persons interested in the said steamboat or vessel, her tackle, etc., may be cited in general and special to answer the premises, and that all proceedings being had, that the said steamboat or vessel, her tackle, etc., may, for causes in the said libel mentioned, be condemned and sold to pay the demands of the libelants.

You are hereby commanded to attach the said steamboat Manitoba or vessel, her boats, tackle, etc., and to detain the same in your custody until the further order of the said court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said libel, that they be and appear before the said court, to be held in and for the said eastern district of Michigan, on the first Tuesday of October next, at ten o'clock of the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same and to make their allegations in that behalf. And what you shall have done in the premises do you then and there make return thereof, together with this writ.

Witness the Honorable Henry B. Brown, judge of the district court of the United States for the eastern district of Michigan, at the district court room, in the city of Detroit, in the said district, this 4th day of September, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States of America the one hundredth.

D. J. DAVISON, *Clerk.*

9 EASTERN DISTRICT OF MICHIGAN, *ss:*

I hereby certify and return that, by virtue of the within writ, I did, on the 4th day of September, A. D. 1875, seize the within-named steamboat Manitoba, her boats, tackle, apparel, and furniture, and now have the same in my custody to await the further order of the court in the premises.

J. R. BENNETT, *Marshal,*
By J. HORN, JR., *Deputy.*

Service, $2.00; miles, 18; paid for tug in making seizure, —. Shipkeeper on board from Sept. 4th, at $2.00 per day.

Filed Sept. 14th, 1875.

D. J. DAVISON, *Clerk.*

10 District Court of the United States for the Eastern District of Michigan. In Admiralty, *ss:*

On this sixth day of September, in the year of our Lord one thousand eight hundred and seventy-five, before Darius J. Davison, a commissioner duly appointed and empowered to take acknowledgments of bail, affidavits, and depositions, etc., within the eastern district of Michigan, in the matter of the libel and claim of Howard M. Hanna and George W. Chapin against the Steamer Manitoba, her engine, machinery, &c., in a cause of collision, civil and maritime, moved and prosecuted in the district court of the United States for the district aforesaid.

Which day personally appeared Henry Beatty and John D. Beatty as claimants of the said steamer Manitoba, her engine, machinery, &c., and produced for sureties Robert J. Hackett and Frederick B. Sibley, of the city of Detroit, in said district; and the said Henry Beatty, John Beatty, Robert J. Hackett, and Frederick B. Sibley, submitting themselves to the jurisdiction of the court, bound themselves, their heirs, executors, and administrators, in the sum of twenty-eight thousand nine hundred and forty-eight dollars and eighty-five cents ($28,948.85), two hundred of said sum being for costs, unto the said Howard M. Hanna & Geo. W. Chapin that the said Henry and John D. Beatty shall abide and answer the decree of the said court in the aforesaid cause, and unless he shall do so they do hereby severally consent that execution shall issue forth against them, their heirs, executors, and administrators, goods and chattels, lands and tenements, wherever the same may be found, to the value of the sum above mentioned.

HENRY BEATTY.
JOHN D. BEATTY.
ROBERT J. HACKETT.
FREDERICK B. SIBLEY.

Taken and acknowledged this 6th day of September, A. D. 1875, before me—

——— ———.

EASTERN DISTRICT OF MICHIGAN, *ss:*

Appeared personally Frederick B. Sibley, of the city of Detroit, and made oath that he is worth the sum of thirty thousand [dollars] of lawful money of the United States of America, after payment of his just debts, in real estate subject to execution within the eastern district of Michigan.

FREDERICK B. SIBLEY.

On the 6th day of September, A. D. 1875, the said Frederick B. Sibley was sworn to the truth of the above attestation before me, D. J. Davison, U. S. commissioner 6th circuit and eastern district of Michigan.

Filed Sept. 6th, 1875.

D. J. DAVISON, *Clerk.*

11 District Court of the United States for the Eastern District of Michigan. In Admiralty, *ss:*

On this ninth day of September, in the year of our Lord one thousand eight hundred and seventy-five, before Darius J. Davison, a commissioner duly appointed and empowered to take acknowledgments of bail, affidavits, and depositions, etc., within the district of Michigan, at Detroit, in said district—

In the matter of the libel and claim of Howard M. Hanna and Geo. W. Chapin against the Steamboat Manitoba, her engines, &c., in a cause of collision, civil and maritime, moved and prosecuted in the district court of the United States for the eastern district of Michigan—

Which day appeared personally the above-named Howard M. Hanna [and] Geo. W. Chapin and produced for sureties John W. Thomson, of the city of Detroit, in said district; and the said Howard M. Hanna, Geo. W. Chapin, and John W. Thomson, submitting themselves to the jurisdiction of the aforesaid court, bound themselves, their heirs, executors and administrators, in the sum of two hundred and fifty dollars, for the benefit of whomsoever it may concern, that the said Hanna and Chapin shall prosecute *his* action in this behalf and abide by all orders, interlocutory and final, of the aforesaid court, or of any appellate court, and unless *he* shall so do they do hereby severally consent that execution shall issue forth against them, their heirs, executors, and administrators, — goods, and chattels, wheresoever the same may be found, to the value of the sum above mentioned.

HANNA & CHAPIN,
Per J. W. THOMSON, *Ag't.*
JOHN W. THOMSON.

Taken, subscribed, and acknowledged before me this 9th day of September, 1875.

D. J. DAVISON,
U. S. Comm'r, 6th Circuit, Eastern District of Michigan.

Filed Sept. 9, 1875.

D. J. DAVISON, *Clerk.*

12 In the District Court of the United States for the Eastern District of Michigan. In Admiralty.

The answer of James H. Beatty, Henry Beatty, William Beatty, and John D. Beatty to the libel of Howard Melville Hanna and Geo. W. Chapin against the Steamboat Manitoba, her engine, boats, &c., alleges as follows:

First. That these respondents are the sole, true, and *bona fide* owners of the steamboat Manitoba, her engine, &c., and that no one else is the owner thereof or any part thereof; that these respondents have filed their claim to the said steamboat, her engine, &c., and have given a bond therefor under the orders of said court; that these respondents are ignorant as to the ownership of the said pro-

peller Comet, as set forth in said libel, and will require strict proof thereof; that these respondents admit the burthen of the said steamboat Manitoba as set up in the first article of said libel.

Second. That these respondents admit that a collision took place between the propeller Comet and the steamboat Manitoba on or about the 26th day of August, A. D. 1875, to the southerly and easterly of White Fish Point, in Lake Superior; admit that by said collision the said propeller Comet was sunken, but these respondents deny that the facts and circumstances attending such collision were as set up in the second article of said libel. They deny that the said Comet was tight, staunch, and strong; deny that she was well manned, tackled, appareled, and appointed; deny that she had the necessary complement of officers and men properly stationed and upon the lookout for the safety of the vessel; deny that they were vigilantly observing the approaching steamboat, and deny that the said propeller, at a distance from which ordinary lights on a steamboat could be seen on a clear night, proceeded holding the red light of the Manitoba off her port bow, and deny that she properly sounded her whistle or did all that the law and good seamanship required of her or that was possible for her to do to avoid the steamboat, and expressly deny that the said steamboat or her officers or crew were guilty of any fault, carelessness, negligence, or recklessness which in any manner contributed to the collision, as set forth in the second article of said libel; that these respondents allege that the facts and circumstances attending said collision were as hereinafter stated and not otherwise.

Third. That on or about the night of the 26th of August the steamboat Manitoba was bound on a voyage from Sarnia, Ontario, to Duluth, Minnesota, ladened with a cargo of general merchandise and about 45 passengers; that the said steamboat was tight, staunch, and strong, well officered, manned, and equipped, with her signal lights properly placed and brightly burning; that when she had proceeded on her voyage so far as to have passed into Lake Superior, and being about half way between Round Island and Point Iroquois, with her officers and crew properly stationed and
13 vigilantly attending to duty, when, at about eight o'clock p m. of the day aforesaid, her watch made the bright light of a vessel, which afterwards proved to be the propeller Comet, approaching from the direction off of White Fish Point, so called, and heading upon nearly, if not quite a parallel, opposite course to that of the steamboat; that the said steamboat was then running at a moderate rate of speed and heading about northwest half north; that the said propeller was approaching showing her bright and green lights bearing from half to three-quarters of a point upon the starboard bow of the said steamboat; that the steamboat was starboarded a half a point and steadied on that course.

That the propeller continued to approach the said steamboat showing her white and green lights only, and as if to pass at a good fair berth on the starboard-hand side of the said steamboat until she appeared to be but a short distance off, when suddenly she was observed by the watch of the steamboat to be swinging in towards the

steamboat and across her bows, as if under a port wheel, upon which reckless act the engine of the steamboat was at once checked, stopped, and backed and made every effort to avoid the collision, but so near was the propeller and so short the time that it was not possible for the steamboat to avoid the collision, and the said propeller and steamboat collided, the said steamboat striking the propeller on her port bow or side cutting into her and causing her to sink.

Fourth. That these respondents are not fully advised as to the value of the said propeller, or of her freight and cargo, except as set forth in said libel, but these respondents, upon information and belief, deny that the said propeller was worth the sum of thirty thousand dollars; deny that the freight was worth the sum of five thousand one hundred and twenty-five dollars, and deny that the cargo was worth the sum of thirty-five thousand dollars, and they expressly deny that, whatever the loss may have been by the said collision, *that* libellants, have a lien upon said steamboat or a claim against the owners therefor as set forth in the third article of said libel.

Fifth. That the said steamboat was greatly injured and damaged in and about her bow by said collision, and these respondents were compelled to take her to the port of Detroit for repairs, and these respondents suffered damage by said collision in the way of cash paid for repairs on said steamboat, for the value of her time while laid up for repairs, and for cash paid for wages and board of the officers and crew of the [steamboat] while laid up for such repairs in the sum of about five thousand dollars, and for which damage these respondents have a claim against said libellants and a lien upon the said propeller Comet enforceable in this court and to enforce said claim and lien these respondents will file herewith a cross-libel.

Sixth. That these respondents deny that said collision was caused solely or in any manner by the negligence or unskillfulness of the persons navigating the said steamboat; deny each and all of the charges of fault in the fourth article of said libel contained; but these respondent, on the contrary, allege that such collison
14 was caused entirely and solely by the fault, carelessness, negligence, and recklessness of those navigating the propeller in that—

1st. She did not have competent officers and watch on deck carefully attending to duty.

2nd. She did not keep her course and pass said steamboat on her starboard hand, but recklessly attempted to cross the bow of said steamboat when she was so near as to make collision probable.

3rd. She did not stop and reverse, but kept up a reckless speed, in her approach to said steamboat, when there was risk of collision.

Seventh. That these respondents, on the filing of their claim to the said steamboat when seized under and by virtue of the writ issued upon the libel filed in said cause, filed also a petition setting forth that as the claim set up by said libellants was much greater than the value of the said steamboat, her freight, &c., and prayed that the

said steamboat and her freight, then pending, might be appraised and valued under the direction of the said court; and that such proceedings were had and such order was made in the premises that these respondents were required to and did give a good and sufficient bond, in the sum of twenty-eight thousand nine hundred and fifty dollars, as a substitute for the said steamboat and her freight, then pending, with such sureties as were approved by said court, and thereupon the said steamboat was relieved and delivered free from claim on account of said collision to these respondents. And these respondents allege, as they are informed and verily believe, that as these respondents, the owners of the said steamboat, were not officers of said steamboat nor on board thereof, or privy to said collision, they are fully protected as a matter of law under and by virtue of an act of Congress of the United States entitled "An act to limit the liability of said owners and for other purposes," and approved March 3rd, 1851, against any recovery from them or the said steamboat for any sum greater than the penal sum named in said bond. And these respondents claim and pray the benefit of said act and of all other acts limiting their liability, should the said steamboat, her officers or crew, be found guilty of any fault which caused said collision.

Wherefore these repondents pray that on the filing of the cross-libel herewith all proceedings in the said cause be stayed until the said libellants shall give security for the payment of the damages suffered by these respondents by said collision; that both libel and cross-libel be considered and tried together, and that the said libellants may be decreed to pay to these respondents their damages as aforesaid, and that the said libel may be dismissed, with costs of suit, to be taxed.

JAMES H. BEATTY.
HENRY BEATTY.
WILLIAM BEATTY,
By JOHN D. BEATTY.
JOHN D. BEATTY.

MOORE, CANFIELD & WARNER,
Proctors for Respondents.

15 STATE OF MICHIGAN, } ss:
County of Wayne, }

On this 13th day of November, A. D. 1875, personally appeared before me John D. Beatty, who, being by me duly sworn, says that he is one of the above-named respondents; that he has heard read the foregoing answer by him subscribed and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be on information and belief, and as to those matters he believes it to be true.

THOS. BOWRING,
Notary Public, Wayne County, Mich.

Filed November 17th, 1875.

D. J. DAVISON, *Clerk.*

16. In Admiralty.

To the Hon. Henry B. Brown, judge of the U. S. district court for the eastern district of Michigan:

The cross-libel of James H. Beatty, Henry Beatty, William Beatty, and John D. Beatty, of Sarnia, Ontario, to the libel of Howard M. Hanna and George W. Chapin, filed in said court, against the Steamboat Manitoba and against the Propeller Comet, the alleged property of the said Hanna and Chapin, and her boats, tackle, apparel, and furniture, and against all persons lawfully intervening for their interest therein in a cause of collision and damage, civil and maritime.

And therefor the said cross-libellants do allege and propound as as follows:

First. That your cross-libellants, at the time when the cause of action hereinafter stated arose, were the owners of the steamboat Manitoba, which said steamboat, as well as the aforesaid propeller Comet, were vessels of twenty tons burthen and upwards, and were employed in the business of commerce and navigation between ports and places in different States and Territories upon the lakes and navigable waters connecting said lakes within the true meaning and intent of the act of Congress.

Second. That on the 26th day of August, A. D. 1875, the said steamboat being then and also at the time of the collision hereinafter mentioned tight, staunch, strong, and in every respect well manned, tackled, apparelled, and appointed, and having the usual and necessary complement of officers and men stationed at their proper posts and upon the lookout for the protection and safety of said vessel, was bound on a voyage from the port of Sarnia, Ontario, to the port of Duluth, in the State of Minnesota, having her lights properly placed and burning, and having on board about 45 passengers and a cargo of general merchandise.

Third. That when she had proceeded on her voyage so far as to have passed into Lake Superior, and being about half way between Round Island and Point Iroquois, with her officers and crew properly stationed and vigilantly attending to duty, when at about eight o'clock p. m. of the day aforesaid, her watch made the bright light of a vessel, which afterwards proved to be the propeller Comet, approaching from the direction of off White Fish Point, so called, and heading upon nearly, if not quite, a parallel opposite course to that of the said steamboat; that the said steamboat was then running at a moderate rate of speed and heading about northwest half north; that the said propeller was approaching, showing her bright and green lights, bearing from half to three-quarters of a point upon the starboard bow of the said steamboat; that the steamboat was starboarded a half a point and steaded in that course; that the propeller continued to approach the said steamboat, showing her white and green light only, and as if to pass at a good fair berth on the starboard-hand side of the said steamboat, until she appeared
17 to be but a short distance off, when suddenly she was ob-

served by the watch of the steamboat to be swinging in towards the steamboat and across her bows as if under a port wheel, upon which reckless act the engine of the steamboat was at once checked, stopped, and backed and made every effort to avoid the collision, but so near was the propeller and so short the time that it was not possible for the steamboat to avoid the collision, and said propeller and steamboat collided, the said steamboat striking the propeller on her port bow or side, cutting into her and causing her to sink.

Fourth. That by said collision the said steamboat was greatly injured and damaged in and about her bow, so much so that these cross-libellants were compelled to take her to the port of Detroit for repairs; and that cross-libellants suffered damages by such collision in the way of cash paid for repairs of damage done, for wages and board of the officers and crew of said steamboat, and for the value of the time of the said steamboat while necessarily detained for repairs a large sum of money, to wit, the sum of five thousand dollars, and for such sum cross-libellants have a lien upon the said propeller Comet, her engine, &c., and a claim against the said Hanna & Chapin, her owners, which lien is enforceable in this court.

Fifth. That cross-libellants allege that such collision and damage were caused entirely and solely by the fault, carelessness, negligence, and recklessness of those navigating the propeller; that among such acts of fault, carelessness, and negligence of the said propeller and those navigating her cross-libellants allege—

1st. That she did not have competent officers and watch on deck carefully attending to duty.

2nd. She did not keep her course and pass said steamboat on her starboard hand, but recklessly attempted to cross the bow of said steamboat when she was so near as to make collision probable.

3rd. She did not stop and reverse, but kept up a reckless speed on her approach to said steamboat when there was risk of collision.

Sixth. That the said Hanna & Chapin have heretofore filed a libel against the said Steamboat Manitoba, claiming damages for said collision; that said cross-libellants have filed their answer to said libel or file the same herewith; have caused the said steamboat to be bonded and released and discharged from all claim arising from said collision, as cross-libellants are informed and believe; that in their said answer these cross-libellants prayed that the proceedings under said libel should be stayed by order of court until the said libellants should file a bond to pay cross-libellants damages as aforesaid.

Seventh. That cross-libellants suffered damages by such collision in a sum as aforesaid, amounting in all to the sum of five thousand dollars, for which your cross-libellants claim to have a lien upon said vessel enforceable in this honorable court.

Eighth. That the aforesaid collision and damages *was* occasioned solely by the negligence, unskillfullness, and carelessness of the persons navigating the said propeller Comet, and not by

or through any fault, negligence, or improper conduct on
18 the part of your cross-libellants, said vessel, her master or crew.

Ninth. That all and singular the premises are true, and that the said propeller Comet is now lying, sunken, as cross-libellants are informed and believe, in the district aforesaid.

Wherefore your cross-libellants pray that process in due form of law, according to the course and practice of this honorable court in cases of admiralty and maritime jurisdiction, may issue against the said Propeller Comet, and to the said Hanna & Chapin, her boats, tackle, apparel, and furniture, and that all persons having any interest therein may be cited to appear and answer all and singular the matters aforesaid, and that this honorable court will be pleased to decree the payment of the damages aforesaid, with costs, and that the said Hanna & Chapin may be ordered to pay the same, and that your cross-libellants may have such other and further relief as in law and justice they are entitled to receive.

JAMES H. BEATTY.
HENRY BEATTY.
WILLIAM BEATTY,
By JOHN D. BEATTY.
JOHN D. BEATTY.

MOORE, CANFIELD & WARNER,
Cross-Libellants' Proctors.

EASTERN DISTRICT OF MICHIGAN, *ss:*

Be it remembered that on this thirteenth day of November, A. D. 1875, before me, at Detroit, in said district, personally appeared the within-named John D. Beatty, one of the within-named cross-libellants, and made solemn oath that he had heard read the foregoing libel and knows the contents thereof, and that the same is true as to his own knowledge, except as to those matters and things stated to be on his information and belief, and as to these matters and things he believes it to be true.

THOS. BOWRING,
Notary Public, Wayne County, Mich.

Filed November 17th, 1875.

D. J. DAVISON, *Clerk.*

19 United States District Court, Eastern District of Michigan. In Admiralty.

To the Honorable Henry B. Brown, judge of the U. S. district court for the eastern district of Michigan:

The answer of Howard M. Hanna and Geo. W. Chapin to the cross-libel filed in said court against them by James H. Beatty, Henry Beatty, William Beatty, and John D. Beatty alleges as follows:

First. That they admit the allegations in the first article of the cross-bill contained.

Second. That they deny that said steamboat Manitoba, at and prior to the time of said collision, had her necessary complement of officers and men stationed at their proper posts or on lookout for the protection and safety of said steamboat, as alleged in the second article of said cross-libel.

Third. That they deny that the Comet, as she approached the Manitoba, was showing her green light, or that she was bearing on the starboard side of the Manitoba, or that she at any time showed her green light to the Manitoba, or that she appeared at any time as if to pass on the starboard side of the Manitoba, or that she swung across the bows of the Manitoba, or that the Manitoba was checked, stopped, or backed before the collision took place, or that the Manitoba made any proper effort to avoid said collision, as alleged in the third article of said cross-libel, but they allege the facts to be as in their libel they have already fully alleged and set forth.

Fourth. That they are ignorant of the matters and things in the fourth article of said cross-libel contained, and therefore deny the same.

Fifth. That they deny that said collision or damage was occasioned by any fault, carelessness, negligence, or recklessness of those navigating the Comet, or that she did not have competent officers or watch on deck attending to duty, or that she attempted to cross the bows of the Manitoba, or that she did not stop or reverse, or that she kept up too great a speed when there was risk of collision.

Sixth. That they are ignorant of the allegations in the seventh article of the cross-libel contained, and therefore deny the same.

Seventh. That they deny the allegations in the eighth article of the cross-libel contained.

Eighth. Respondents allege that by said collision their said propeller Comet was sunk and destroyed, and became, together with her pending freight, totally lost; that thereby, under section 4283 of the Revised Statutes of the United States, these respondents were free and discharged from any liability to the libellants by reason of said collision and damage.

Wherefore respondents pray that said cross-libel may be dismissed, with costs.

WILLEY & TERRELL,
Proctors for Respondents.

20 STATE OF OHIO, } ss:
Cuyahoga County, }

H. M. Hanna, being duly sworn, says that he is one of the respondents in this above-entitled cause, and that the facts set forth and allegations in the foregoing answer are true, as he believes.

H. M. HANNA.

Sworn to before me and subscribed in my presence this 4th day of December, 1877.

A. McLEE,
Notary Public.

Filed December 6, 1877.

D. J. DAVISON, *Clerk.*

21 At a session of the district court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment at the district court room, in the city of Detroit, on Monday, the twenty-ninth day of April, in the year of our Lord one thousand eight hundred and seventy-eight.

Present: Honorable Henry B. Brown, district judge.

On a Libel for Collision.

In Admiralty.

HOWARD M. HANNA & GEO. W. CHAPIN

vs.

THE STEAMER "MANITOBA," Her Engine, &c.

And the cross-libel of—

JAMES H. BEATTY, HENRY BEATTY, WM. BEATTY, and JOHN BEATTY

vs.

THE PROPELLER "COMET," Her Engine, &c.

These causes having been heretofore heard together and submitted to the court for judgment, and the court having taken time to consider of its decree herein, and the court having duly weighed the pleadings and proofs and the arguments of counsel submitted herein, and mature deliberation being had, doth now order, adjudge, and decree that the damages on occasion of the collision mentioned and set forth in the said libel and cross-libel be divided, and that for the purpose of ascertaining the amount of said damages it is further ordered and decreed that it be, and is hereby, referred to a commissioner of the circuit court of the U. S. for the eastern district of Michigan to take proofs and to ascertain and compute the amount of said damages and to report the same to this court with all convenient speed.

22 *Copy of Opinion of Judge Brown.*

District Court of the United States for the Eastern District of Michigan. In Admiralty, Ap'l 29, 1878.

THE MANITOBA.

On libel and cross-libel for a collision between the propeller "Comet" and the British side-wheel steamship "Manitoba."

The collision occurred about eight o'clock in the evening of the 26th of August, 1875, from six to eight miles to the southward and eastward of White Fish Point, in Lake Superior.

The case of the "Comet" was that being bound on a voyage from Grand Island, Lake Superior, to Cleveland, and, having shortly before rounded White Fish Point, at about eight o'clock in the evening she made the bright, and shortly thereafter the red light of the "Manitoba" from one-fourth to one-half a point upon her port bow; that when the red light was made the wheel of the "Comet"

was ported half a point and then steadied; that, after running upon this course a short time and failing to open out the "Manitoba," the "Comet" again ported half a point and sounded a single blast of the whistle, to which there was no reply. Still failing to shake off the "Manitoba," which appeared to be swinging under a starboard wheel, the wheel of the "Comet" was put hard-a-port. The "Manitoba" shut in her red and opened her green light; whereupon the engines of the "Comet" were stopped and reversed, but without avail. The "Manitoba" struck her on the port bow, cutting her nearly in two, sinking her in less than two minutes and destroying the lives of eleven men.

23 The principal fault charged on the part of the "Manitoba" was that of starboarding her wheel instead of porting, as she was bound to do, as the vessels were meeting end on or nearly end on.

The case of the "Manitoba" was that, being on a voyage from Sarnia, Ontario, to Duluth, Minnesota, and having passed St. Mary's canal, and being about half way between Round Island and Point Iroquois, she made the bright light of the "Comet," which was approaching from the direction of White Fish Point and heading upon nearly if not quite a parallel opposite course to that of the "Manitoba;" that the steamship was running at a moderate rate of speed and heading about northwest half north; that as the "Comet" approached she exhibited her bright and green light bearing from half to three-quarters of a point upon the starboard bow of the "Manitoba;" that to avoid the possibility of a collision the steamboat was starboarded half a point and steadied; that the propeller continued to approach, showing her white and green lights only as if to pass at a fair berth on the starboard side of the "Manitoba" until she appeared to be but a short distance off, when suddenly she was observed to be swinging to starboard and across the bows of the "Manitoba," as if under a port wheel, upon which the helm of the "Manitoba" was put hard-a-starboard, her engines stopped and reversed, but the propeller had then approached so near that it was impossible to prevent the collision.

The fault charged upon the "Comet" was that of porting instead of starboarding, and the question was directly raised
24 whether these vessels were approaching so as to exhibit each to the other a green or red light.

This was the question argued at the hearing.

MR. H. L. TERRILL,
For Libelants.

MESSRS. W. A. MOORE AND F. H. CANFIELD,
For Claimants.

25 BROWN, *J.*:

Before entering upon a discussion of the testimony, there is a legal proposition to which the attention of the court was challenged at the outset of the argument and which libelants claim is decisive of the case. Admitting the theory of the "Manitoba" to be true, that she made first the bright and then the green light of the "Comet" three-quarters of a point on her starboard bow, it was in-

sisted that the steamers were meeting "nearly end on" within the XIII article, and that it was incumbent on the "Manitoba" to port instead of starboarding as she did. The words "nearly end on" used in the XIII article are susceptible of two entirely distinct interpretations. On behalf of the "Comet" it is urged that if vessels are approaching so nearly end on that prudence will suggest a change of the helm to avoid a misapprehension or chance of collision, such change should always be made by porting, notwithstanding the approaching vessel may exhibit a green light upon the starboard bow. Under the other definition, if the two vessels are each exhibiting to the other lights of the same color there is no risk of collision, within the meaning of the article, and each vessel is bound to keep its own side and may pursue its course with unabated speed; or, as formulated in the lines of Mr. Gray, "green to green or red to red, perfect safety, go ahead." The earlier decisions, both English and American, no doubt go far to sustain the position of the libelants upon this point.

The merchants shipping act which in England preceded the present law under which the vessels of all civilized nations
26 are now navigated, provided that "whenever any ship, whether a steam or sailing ship, proceeding in one direction meets any other ship, whether a steam or sailing ship, proceeding in another direction so that if both ships were to continue their respective courses they would pass so near as to involve any risk of collision, the helms of both ships shall be put to port so as to pass on the port side of the other," a rule substantially like the XIII article except that it imposes upon the sailing vessel an obligation to port when meeting a steamer.

In construing this rule in the case of the "Navigator," Swab., 120, a ship which was running free was held to be in fault because seeing the steamer's green or starboard light three or four points on her starboard bow she held on her course, the master believing that if the steamer did likewise the vessel would have gone clear. He ought, it was said, to have expected that the steamer on seeing this light would have followed the rule and have ported, and should, therefore, have ported his own helm. See also the "Admiral Boxer," Swab., 192. In the "Cleopatra," a steamer was condemned for having starboarded on making the bright and green lights of an approaching vessel three points on her starboard bow, distant about three miles. So, too, in the case of the "Stork," decided after the present law had taken effect. Dr. Lushington decided that in order to excuse the "Stork" from porting it must be quite clear there were three points difference, and not less, for surely it would never do to contend, where they were so nearly meeting end on, that if the evidence should
be it was one or two points only in the direction they
27 were meeting that that would be sufficient to dispense with the observance of this rule. On appeal to the privy counsel the court refused to adopt the language of Dr. Lushington, but observed, "It was not necessary to lay down any rule if it were competent for them to do so. It is sufficient to say that whether the vessels were in such a relative position as to involve the risk of a

collision must always be a question of fact to be determined upon the circumstances." The court, however, found that the vessels were in such a relative position that their course, if pursued, would have involved risk of a collision and dismissed the appeal.

In the case of the "City of Paris," Holt, 21, the question was put to the assessors whether, "when the steamer first saw the steam-tug moving towards her and two points on her starboard bow, taking into consideration these vessels being on nearly opposite courses, was there danger of their meeting end on or nearly end on, so as to involve a risk of collision?" and they answered "that the vessels were coming nearly end on, and the duty of each was to have ported." In the case of the "Fingal," Holt, 160, the court considered that if the vessels were within two points of meeting end on, they would fall within the latter part of the statement, "nearly end on." In the case of the "Artemis," Holt, 75, a difference of two points was held not to exempt the vessels from the regulation of the XI article.

See also the "Mexican," Holt, 130. A similar want of definiteness is apparent in the American authorities.

See the "Milwaukee," 1 Brown's Adm'r., 313.

The "Nichols," 7 Wall., 656.

28 This construction of the act naturally led to a want of uniformity in the practice, shipmasters as well as courts disagreeing among themselves as to how great a variance from dead ahead would still meet the requirements of nearly end on.

There was further difficulty involved in the fact that the exhibition of green light or green and white lights directly ahead or on the starboard bow is consistent not only with vessels approaching upon a parallel course, but upon a course across that of the other vessel, in which case porting the helm would bring about the very disaster that it was designed to avoid; in other words, the light may be dead ahead or nearly dead ahead, and yet the two ships may not be meeting end on.

To justify porting under article XIII, not only must the ship carrying the light be end on, but the two ships must be meeting each other in that position, and the exhibition of a single colored light directly ahead by no means justifies that inference.

To put an end to this uncertainty and to define with the utmost practicable exactness the meaning of the words "nearly end on," on the thirtieth of July, 1868, an order in council was issued to the following effect:

"The said two articles numbered XI and XIII, respectively, only apply to cases where ships are meeting end on or nearly end on in such a manner as to involve risk of collision. They consequently do not apply to two ships which must, if both keep on their respective courses, pass clear of each other. The only cases in which the said two articles apply are when each of the two ships is end on or nearly end [on] to the other—in other words, the cases in which
29 by day each ship sees the masts of the other in a line or nearly in a line with her own and by night to cases where each ship is in such a condition as to see both of the side lights of

the other. The said two articles do not apply by day to cases in which the ship sees another ahead crossing her own course or by night to cases where the red light of one ship is opposed to the red light of the other, or where the green light of one ship is opposed to the green light of the other, or where a red light without a green light or a green light without a red light is seen ahead, or where both red or green lights are seen anywhere but ahead."

While this order has never been formally accepted by the Supreme court as the correct interpretation of the XIII article, it has received the sanction of the district courts for the southern and eastern districts of New York and has not, so far as I can gather, been repudiated anywhere.

It was adopted *verbatim* by Judge Blatchford in the case of the steam ferry-boat "America," 3 Benedict, 424, and was approved by Judge Benedict in the "Sylvester Hale," 6 Benedict, 523.

It appears also to have been adopted by the assembly of the senate at Hamburg October 16, 1868, by Russia November, 1868, and by Sweden December, 1868. While in some cases where a colored light is made very nearly dead ahead it may lead vessels approaching each other in a dangerous proximity, it is quite evident that so long as each exhibits to the other a light of the same color there can be no collision, and any liability to error or confusion can be obviated by porting from a red or starboarding from a green light. As it is very desirable that the construction given to this law should
30 be as uniform as the law itself is general, particularly upon waters where British and American vessels are constantly meeting each other, I deem it the safer and better plan to adopt the order in question as the law of this court, at least until overruled by a higher authority. I hold, therefore, that under her theory of the facts the "Manitoba" was not in fault for starboarding as she did.

What the exact facts of this collision are it is certainly difficult to determine. Not only is the testimony upon either side in direct and irreconcilable conflict with that upon the other, but the witnesses upon one if not upon both sides swear to appearances utterly inconsistent with the movements of their own vessels, as stated by them. The theory of the "Comet," that she made the red light of the "Manitoba" and kept it constantly on her port bow, is not only sworn to directly by her master, her second mate, and her wheelman, but it is claimed to be verified and in fact demonstrated by two subordinate circumstances proved by uncontradicted testimony.

First. That the "Comet," in rounding White Fish Point, hugged as close to land as possible, expecting heavy seas, and hence when she straightened upon her course to Point Iroquois she was further to the westward than the usual course of vessels intending to round that point would take them, while the "Manitoba," intending to make Michipicoten on the northeast shore, would naturally have been further to the eastward than the usual course of vessels rounding the point would take them.

The testimony of the "Comet's" crew does tend to show
31 that she passed a little nearer the point than usual, although

there was a heavy wind from the southeast blowing on to the point, and it is a little difficult to see why she should wish to hug it so close, but in that regard it appears to be contradicted by that of the master and mate of the "Havana," a steamer bound up, which passed the "Comet" a short distance below White Fish Point and some seven or eight hundred feet upon her port side.

These witnesses swear that they passed White Fish Point themselves at the usual distance of a mile or a mile and a quarter, indicating that the "Comet" was probably about a mile out from the point when she passed it. In this connection they also swear that they saw the "Manitoba's" light astern and upon their port quarter. While it is true the "Manitoba" was intending to stop at Michipicoten, the direct course to which would lead her a considerable distance off White Fish Point, yet as her crew unite in swearing that they were steering for the light upon the point, keeping it a little off their port bow and intending to pass it at the usual distance, I do not feel at liberty to say that they are not to be believed in this particular.

Second. Shortly after rounding White Fish Point the "Comet" made the lights of the barge "Havana" a little to port, and to give her an easy berth she ported half a point and ran from five to fifteen minutes under this port wheel before resuming her southeast course down the lake.

Whatever weight is given to this testimony is counterbalanced by the fact that the general course of the "Comet" down the
32 lake was half a point further to the eastward than it would have been if she had been sailing in a course directly opposite to that of the "Manitoba." The course of the "Manitoba" was northwest half north while that of the "Comet" was directly southeast. The tendency of this divergence would be, assuming that [the] compasses of each were exactly alike, to display the green light of the "Comet" to the "Manitoba."

A change of half a point from a course parallel to that of the "Manitoba" would in a distance of six miles carry the "Comet" about a half a mile to the eastward of the "Manitoba's" course, assuming that compasses were alike, and that the "Manitoba" was pursuing the usual course from Point Iroquois to White Fish Point. While there is nothing showing that the "Comet" did deviate to that extent, it seems to me to offset an inference which might be derived from the fact of the "Comet" porting to pass the "Havana" that she was westward of the "Manitoba's" course.

Third. It is claimed to be a physical impossibility that these vessels should have collided as they did from the positions in which the evidence of the "Manitoba" places them at the time the "Comet's" wheel was put hard-a-port and the "Manitoba's" hard-a-starboard.

At the time the "Comet" put her wheel hard-a-port and exhibited her red lights the witnesses on board the "Manitoba" claim that she was from 350 to 400 feet ahead of her and about the same distance a-starboard. The speed of the "Manitoba" being considerably greater than that of the "Comet," it would seem to follow that if the helm of the "Manitoba" had been put to starboard at

33 the same time that that of the "Comet." was put to port the "Manitoba" would have passed the point of intersection first, and hence the inference is that the relative positions were not as stated by the "Manitoba," but that the "Comet" was to the port instead of to the starboard.

Assuming that the helms of both vessels were put hard over at the same moment, and adding to this the fact that the "Manitoba" was the faster vessel, it would necessarily follow that she would have passed the point of intersection first; but the theory of the "Manitoba" is not inconsistent with a sudden prior porting on the part of the "Comet" and a failure on the part of the "Manitoba" to swing as rapidly to port as the "Comet" did to starboard.

If the "Comet" ported her wheel before the "Manitoba" starboarded—and this is the "Manitoba's" theory—she would have the advantage of the "Manitoba" and might pass the point of intersection first; it would naturally take some little time for the "Manitoba" to get her wheel hard over and to deviate from her course. There is another inference, however, to be deduced from this theory of the "Manitoba," to which allusion will be made hereafter.

The case made by the "Comet" is manifestly inconsistent with itself and untrue.

If she made the "Manitoba's" red light on her port bow and ported half a point, and again another half a point, and still she could not open out the approaching vessel, it shows conclusively that they must have been approaching on converging lines,
34 and that the "Manitoba" must have displayed a green and not a red light. I am more inclined to think, however, that she made the red light of the "Manitoba" on her starboard bow and that her first porting brought her on a course exactly parallel to that of the "Manitoba," and that her green light was displayed at a considerably greater distance than the "Comet's" testimony would seem to indicate, and that the collision was brought about by a persistent effort to apply the XIII rule and to pass the "Manitoba" under a port helm. This is corroborated to a certain extent by the statement of Rafferty, the wheelman, on cross-examination, that he judged the "Manitoba" was half a mile off when she showed her green light.

I feel compelled to say, too, that considerable doubt is thrown upon the "Comet's" case by the testimony of Mr. Hathaway, the reporter of the "Free Press," who swears that Capt. Dugot told him that he had been on deck about half an hour, and leaving the boat in charge of the mate went below, but was not gone more than five minutes before returning.

Hathaway being entirely disinterested, I am disposed to credit his testimony, notwithstanding Dugot's denial.

The case of the "Manitoba" is supported by the testimony of her master, mate, wheelman, engineer, and cabin-boy, whose statements are also corroborated by those of four passengers.

While in an ordinary collision case the court will pay very little regard to a mere preponderance in the number of the crew sworn,

and will seek to determine the question of fault by the uncontradicted testimony, and by the probabilities of the case, I do not
35 feel at liberty to treat so lightly the testimony of disinterested and intelligent passengers, provided they are so located as to be able to observe the bearing and colors of the approaching lights. The testimony of the "Manitoba's" passengers has aided me greatly in solving the difficult problem of the relative bearing of these vessels.

George Bissett, a merchant of Kincardine, was standing forward on the promenade deck for twenty minutes before the collision; noticed the "Manitoba" steering between the white light of the "Comet" and the light upon White Fish Point.

Capt. Symes came back and spoke to him; showed him the green light and said, "We have to pass on the green side with our green side, and if a red light were shown we would have to pass on the red side;" was then standing right at the center of the promenade deck; stood there until four or five minutes before the collision; then, going for a moment into the cabin to light his cigar, returned to the deck and stood leaning against the railing on the starboard side about 20 feet from the stem.

The "Comet" was still displaying a green light; looked over his left shoulder to see her pass, and, not seeing her, looked ahead and saw her across the bows of the "Manitoba."

George W. Barry, a druggist and insurance agent of Lucknow, was standing on the bow of the boat on the promenade deck fifteen minutes before the collision; saw the bright light of the "Comet" on the starboard bow and White Fish light on the port bow, but did not notice the colored light; noticed Bissett and Capt. Symes talking together; saw the sudden sheer of the "Comet" across the bow.

36 John S. Tenant, a physician of Lucknow, was standing on the promenade deck at the foot of the ladder, to the right of the pilot-house; saw the white and green lights of the "Comet" on the starboard bow. The "Manitoba" seemed to be steering between the "Comet" and White Fish Point light; suddenly saw her sheer and show her red light so near that he thought he could throw a stone aboard of her.

Angus Bethune, paymaster of the railroad from Fort William to Red River, had been to Ottawa on Government business, and was returning on the "Manitoba;" was sitting at the door of the engine-room taking a smoke; got up and walked to the forward right-hand gangway of the steamer to look for White Fish Point light; saw a steamer ahead; called the engineer and remained there, and soon discovered the steamer was coming towards us; said to him there was a steamer coming, and that she was on the wrong side.

The engineer came up and said there was plenty of room to pass on that side; soon saw the "Comet" coming down upon us, her broadside crossing our bows. The engineer looked and ran back to his engine. She would have passed on our right-hand side if she kept her course; seemed to be a couple lengths or more off when she changed her course.

Now, conceiving what unfortunately is too often true of sailors,

that they place a higher value on fidelity to their vessel than upon fidelity to truth, and esteem their allegiance more sacred than their oath, I cannot assume that mere passengers are actuated by any such motive. These four men have sworn to a state of facts
37 entirely inconsistent with the theory of the "Comet," and strongly corroborative of that of the "Manitoba." They were in a position to see, and they can hardly have been mistaken. They have sworn to the truth, or they have been guilty of a perjury which has not even the excuse of self-interest to palliate its heinousness.

I do not overlook in this connection the statements said to have been made by the master end engineer of the "Manitoba" after the collision. They are sworn to by the master and second mate of the "Comet" and denied by the parties who are said to have made them. As the witnesses on both sides are equally interested, and the words are very likely to have been misunderstood, I must hold they are not proven.

Upon careful perusal of this testimony I am forced to the conclusion that these vessels were mutually displaying their green lights, and that the collision was brought about primarily by the unauthorized porting of the "Comet."

It only remains to consider whether the "Manitoba" be not also in fault for not slacking speed. The testimony is uncontradicted that the engineer did not receive the order to stop and back until just as the vessels came together.

That there is no general obligation to slacken speed when two steamers are approaching each other in such a manner that no change of helm is necessary to avoid risk of collision is undisputed.

"The Earl of Elgin," L. R. 4, P. C. 8.

"The Free State," 91 U. S. R., 200.

It is equally clear that this obligation does arise when-
38 ever there is any uncertainty as to the position or movements of the approaching vessel, or when she appears to be violating the rules of navigation.

In the case of the "Earl of Elgin" an exception is made of cases of a "continuous approach," by which we are to understand not merely where the two colored lights continue to be visible, but a single light appears to be closing in in such a manner as to indicate that the courses of the two vessels are converging. So in the case of the "Scotia," 14 Wall., 181, the court remarked: "We have already said that she was not bound to take any steps to avoid a collision until danger of collision should have been apprehended, and we think there was no reason for apprehension until the ship's light was seen closing upon her."

S. C., 7 Blatch., 312.

See also the "Mary Sanford," 3 Ben., 100.

In the case of "Dyer *vs.* The National Steam Navigation Co.," 3 Benedict, 173, the steamer was condemned for not slacking speed under similar circumstances. The court observed, p. 173: "It was

the duty of the steamer, as soon as it was noticed that she was not shaking off the light by porting her helm, to have slackened her speed and ascertained the direction in which the ship was sailing and acted accordingly; instead of which she kept up her full speed until the collision was inevitable."

I see no reason to doubt that the "Comet" continued to show her green light until within a short distance of the "Manitoba."

Her course diverged a half a point to the eastward of the "Manitoba;" consequently her first porting brought her upon exactly a parallel course; and as she was to the starboard of the "Manitoba" she would continue to display her green light; and as the "Manitoba" starboarded and opened out this light she might port another half point without shutting it in or showing the red; but approaching the "Comet" so nearly end on as she did she was bound to watch her lights with the utmost vigilance, and to ease her engine the moment she perceived the "Comet" was failing in her duty. There could be no collision so long as the "Comet" continued to exhibit a green light, but there might be such an approach of this light as to show that the "Comet" had ported, a maneuver which, if persisted in, would inevitably throw her across the path of the "Manitoba" and bring about a collision.

That such continuous approach took place and was observed is evident from the testimony of the master and mate.

Capt. Symes says that he made the green light three-fourths of a point on his starboard bow; that he remained on deck five or six minutes, and the green light then bore, at least, half a point on his starboard bow, showing, at least, that he was not opening it out.

The mate who remained in charge of the "Manitoba" up to the moment of the collision says that when they were one and [a] half or two miles apart the green light bore three-fourths of a point on his starboard bow, and he then starboarded half a point, making the green light one and a fourth points off his starboard bow, but that when the "Comet" began to swing the light had closed in, so that it was not more than half a point or a point off. This shows that from the time the "Manitoba" starboarded the "Comet" was steadily drawing in under a port wheel. If the two steamers were approaching upon exactly parallel courses the light of the "Comet" would naturally open up and the starboarding of the "Manitoba" would increase this tendency, so that if the "Comet" had kept her course the angle of the green light with the course of the "Manitoba" would constantly approximate to a right angle; instead of that the light kept steadily closing in. There could be but one inference from this—the "Comet" had ported. This was manifest some time before she shut in her green light and displayed her red light, and the "Manitoba" should at least have eased her engine or blown her whistle, as required by the universal custom upon the lakes.

Nor am I satisfied that the order to stop and reverse was given as promptly as it should have been. According to the "Manitoba's" theory the "Comet" was from 350 to 400 feet to the starboard, and

about the same distance ahead of her before a change of light was observed. The entire testimony on the part of the "Manitoba" tends to show that the "Comet" would have passed from 300 to 400 feet from her if she had kept her course.

Admitting that distances are deceptive and that the "Comet" might have been much further ahead of the "Manitoba" than 400 feet, it seems to me that if the engines of the "Manitoba" had been properly stopped and reversed a collision might have been avoided. Obviously this was the first and instant duty of the "Manitoba" upon discovering the change of lights.

41 A change of wheel was a matter of secondary consideration, but the obligation to stop and reverse was imperative.

In this respect the case is much like that of the "Comet," 9 Blatch., 328, where the injured vessel in this case was libeled for sinking the steamer "Silver Spray" in Lake Huron.

The observations of Judge Woodruff in that case, page 328, are pertinent here. He condemned the "Silver Spray" not only for starboarding but for failure to slacken speed after the red light was disclosed upon her starboard bow.

While I make no criticism upon the action of the "Manitoba" here in putting her helm hard-a-starboard, although I think this was an error, I am of the opinion that she should have stopped and reversed. If she had ported or slowed and backed, and perhaps if she had done nothing, the collision would not have taken place.

After a collision had become imminent almost any error on the part of the steamer will be pardonable, except that of not stopping and reversing, and for this error, which is rendered more probable by the fact that the engineer left his post and ran to the starboard gangway after the "Comet" put her helm hard-a-port, I think the "Manitoba" must be condemned.

The "Great Republic," 23, Wall., 20.

I think, too, the conduct of the master in leaving the deck after the "Comet's" light had been visible for some time and not returning until the collision had become inevitable is open to criticism. Such changes in command are likely to lead to confusion, and are looked upon with great disfavor by courts.

42 Haslett *vs.* Conrad, 1 Dillon, 79.

A decree will be entered apportioning the damages, and referring it to a commissioner to ascertain and compute the same.

43 The District Court of the United States for the Eastern District of Michigan.

HOWARD M. HANNA and GEO. W. CHAPIN

vs.

THE STEAMBOAT MANITOBA, Her Engine, Machinery, Boats, Tackle, &c.

On lible for damages by collision. In admiralty.

And

JAMES H. BEATTY, WM. BEATTY, HENRY BEATTY, and JOHN D. BEATTY

vs.

THE PROPELLER COMET, Her Engine, &c.

On cross-libel for damages by collison. In admiralty.

To the Hon. Henry B. Brown, judge of the district court of the United States for the eastern district of Michigan:

It having been referred to a commissioner of the circuit court of the United States of the eastern district of Michigan to take proofs and to ascertain and compute the amount of the damages resulting from the collision mentioned in the pleadings in this cause, I, the undersigned, such commissioner, having been charged with the execution of said order and having been attended by the proctors for the respective parties, and said matter having been submitted to me for determination on the depositions and proofs hereto attached and made part of this report, and the same having been by me duly considered, *I* do now respectfully report the following items and amounts as comprising the damages sustained on occasion of said collision by the libellants, Howard M. Hanna and Geo. W. Chapin, owners of the propeller Comet, namely:

1. The value of the propeller Comet, which was a total loss, twenty-five thousand dollars	$25,000 00
2. The value of her cargo of iron, 500 tons, @ $28, fourteen thousand dollars	14,000 00
3. The value of 12,196 pounds of wool, @ 28 cts., three thousand four hundred fourteen & $\frac{88}{100}$ dollars	3,414 88
4. The value of 54 sacks containing wool, @ 50 cts., twenty-seven dollars	27 00
5. The value of silver ore, part of cargo, fourteen thousand five hundred dollars	14,500 00
6. The value of freight earned at time of collision, five hundred dollars	500 00
Total damages	$57,441 88

44	Interest thereon from August 26, 1875, the date of said collision, to June 1st, 1880, 4 years, nine months and 4 days, @ 6 per ct.	$16,409 26
	Total	73,851 14

I do therefore respectfully report the amount of the damages of said libelants, Howard M. Hanna and Geo. W. Chapin, owners of the propeller Comet, including interest, to be the sum of seventy-three thousand eight hundred and fifty-one dollars and fourteen cents.

And I do further respectfully report the damages of the said cross-libelants, James H. Beatty, Wm. Beatty, Henry Beatty, & John D. Beatty, owners of the propeller Manitoba, for injuries to the said propeller, to be the sum of five thousand dollars. $5,000 00

Interest thereon from August 26, 1875, the date of said collision, to June 1, 1880, 4 years, nine months, and 4 days, @ 6 per ct., the sum of one thousand four hundred and twenty-eight dollars & thirty-three cents $1,428 33

Total $6,428 33

I do therefore respectfully report that the value of the propeller Comet at $25,000 and the damages to the steamer Manitoba at $5,000 was agreed upon by the proctors for the respective parties for the purposes of the hearing in said reference, and that as to the remaining items of damages it was conceded on said hearing that a fair construction of the testimony in the case authorized the allowance of the several amounts above awarded.

And I do further respectfully report that on said hearing it was agreed by and between the proctors for the respective parties that the commissioner shall only report his findings as to the damages and to accompany his report with the testimony taken on said reference, and that questions desired to be raised by the libelants as to whether damages can be divided, especially as to the cargo and as to the priority of payment to the various parties for whom libelants sue, shall be left for the decision of the court on the coming in of this report.

All of which is respectfully submitted.

Dated June 14, 1880.

D. J. DAVISON,
U. S. Comm'r, East. Dist. Mich.

45 At a session of the district court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment, at the district court room in the city of Detroit, on Wednesday, the 15th day of March, in the year of our Lord one thousand eight hundred and eighty-two.

Present: Honorable Henry B. Brown, district judge.

On Libel and Cross-Libel for Collision.

In Admiralty.

HOWARD M. HANNA & GEO. W. CHAPIN

vs.

STEAMER "MANITOBA," Her Engine, &c.,

and

JAMES H. BEATTY, HENRY BEATTY, WILLIAM BEATTY, & JOHN D. BEATTY

vs.

THE PROP. "COMET," Her Engine, &c.

On reading and filing the report of Darius J. Davison, a commissioner of this court, to whom it was referred to take proofs and to ascertain and compute the amount of said libellants' and cross-libellants' damages on account of the collision mentioned in this cause, from which it appears that the said propeller "Comet" was totally lost by said collision, and that the damages sustained by libellants and the other parties interested in the cargo and hull of said "Comet," on whose behalf said libel was filed, amount to the following sums:

The value of said "Comet" and her appurtenances	$25,000 00
Interest thereon from August 26th, 1875, to March 7th, 1882	9,787 00
The value of the cargo and pending freight of said "Comet"	32,441 88
Interest thereon from August 26th, 1875, to March 7th, 1882	12,700 00
And that the damages sustained by said cross-libellants on account of the injuries occasioned by said collision to the steamer "Manitoba" amount to	5,000 00
With interest thereon from August 26, 1875, to March 7, 1882, amounting to	1,975 40

On motion of proctors for said libellants, it is ordered and decreed that said report be, and the same is hereby, in all things ratified and confirmed.

And it further appearing to the court that the said libellants and cross-libellants have respectively claimed the benefit of the act of Congress of the United States entitled "An act to limit the liability of ship-owners, and for other purposes," being sections 4283, 4284, 4285, and 4286 of the Revised Statutes of the United States, and that the said steamer "Manitoba" has been duly bonded in accordance with the provisions of said statutes, by Henry Beatty and John D. Beatty, claimants, and Robert J. Hackett and Frederick B. Sibley, as sureties, in the sum of $28,694.95, by their bond or stipu-
46 lation, conditioned to abide the decree of this court, and consenting that unless they shall so do execution should issue

against them therefore, which sum is less than the damages occasioned by said collision.

And this court having, by its interlocutory decree heretofore entered into this cause, found that both said vessels were in fault for said collision and that the damages occasioned thereby be equally divided, it is therefore ordered, adjudged, and decreed, that said libellants recover from the said claimants and their sureties the sum of twenty-eight thousand six hundred ninety-four & $\frac{95}{100}$ ($28,694.95), being the amount of said bond or stipulation, and that said libellants have execution therefor against said Henry Beatty, John D. Beatty, Robert J. Hackett, and Frederick B. Sibley.

And it is further ordered that neither the libellants nor the cross-libellants herein recover costs against the other.

And it further appearing to the court that said propeller "Comet" and her appurtenances were insured at the time of her loss in the following named companies:

In the Mercantile Insurance Company of Cleveland, Ohio, in the sum of	$3,000 00
In the Phœnix Insurance Company of New York, in the sum of	2,500 00
In the Orient Insurance Company of New York, in the sum of	2,500 00
In the Northwestern Insurance Company of Milwaukee, in the sum of	3,000 00
In the Royal Canadian Insurance Company of Montreal, in the sum of	5,000 00
In the Tradesmen's Insurance Company of New York, in the sum of	2,500 00
In the St. Paul Fire & Marine Insurance Company, in the sum of	1,500 00

That the cargo of said "Comet" was insured at the time of the loss—

In the St. Paul Fire & Marine Insurance Company, in the sum of	$4,500 00
In the Ætna Insurance Company of Hartford, Connecticut in the sum of	14,000 00

And that each of said companies duly paid the said amount by it, respectively, insured, to the parties entitled to receive the same, and that each of said companies, with the exception of the Ætna Insurance Company, contributed or agreed to contribute to the libellants' costs and expenses in carrying on this action before the rendition of the interlocutory decree of April, 1878, but said Ætna Insurance Company did not so contribute or agree to contribute.

It is, therefore, further adjudged and decreed that said Ætna Insurance Company be not admitted to share in the amount recovered by libellants herein until after the payment in full of the claims of said libellants on their own behalf and on the behalf of said contrib-

uting insurance companies, with interest to the first day of
47 March term, 1882; and that said libellants recover from said Ætna Insurance Company their costs herein sustained in the matter of the petition of said Ætna Insurance Company herein.

Thereupon the said cross-libellants give notice of appeal and are allowed thirty days from this fifteenth day of March to perfect their appeal.

48 *On Libel & Cross-Libel for Collision.*

In the District Court of the United States for the Eastern District of Michigan. In Admiralty.

HOWARD MELVILLE HANNA and GEORGE W. CHAPIN, Owners of the Propeller Comet,

vs.

THE STEAMER MANITOBA.

and

JAMES H. BEATTY, HENRY BEATTY, WILLIAM BEATTY, & JOHN D. BEATTY, Claimants and Owners of the Steamer Manitoba,

vs.

THE PROPELLER COMET.

The above-named James H. Beatty, Henry Beatty, William Beatty, and John D. Beatty, claimants of the steamer Manitoba and the libelants named in the cross-libel against the said propeller Comet, conceiving themselves aggrieved by the final decree of this court made on the 15th day of March, A. D. 1882, in the above-entitled cause, hereby appeal therefrom and from so much thereof as adjudges and decrees the said steamer Manitoba to be in fault for the collision set forth in said original libel, and also from so much of said decree as awards to the said original libelants, Hanna and Chapin, the sum of twenty-eight thousand six hundred and ninety-four and $\frac{95}{100}$ dollars ($28,694.95), without any deduction or allowance therefrom to these appellants on account of injuries occasioned by said collision to the said steamer Manitoba.

And these appellants also appeal from so much of the order and decree made by the court in the above-entitled cause on the 29th day of April, 1878, as adjudges and decrees that the said steamer Manitoba was in fault for said collision, and that the damages occasioned by said collision be equally divided between the owners of said propeller Comet and the owners of said steamer Manitoba.

And they hereby give notice that they will take new proofs upon said appeal under each allegation contained in the pleadings filed in said cause.

April 13, 1882.

MOORE, CANFIELD & WARNER,
Proctors for Claimants of Manitoba, Appellants.

49 The District Court of the United States for the Eastern District of Michigan. In Admiralty.

Whereas an appeal has been taken from the decree of this court made on the 15th day of March, A. D. 1882, in a certain cause wherein Howard Melville Hanna and George W. Chapin are libelants against the Steamer Manitoba, her engines, &c., and James H. Beatty, Henry Beatty, and John D. Beatty, claimants, and wherein James H. Beatty, Henry Beatty, and John D. Beatty are cross-libelants against the Propeller Comet, her engines, &c., by the said claimants and cross-libelants to the circuit court of the United States for the eastern district of Michigan:

Now, therefore, the stipulators undersigned hereby stipulate in the sum of thirty-five thousand dollars to pay all damages and costs which shall be awarded against said appellants by the final decree rendered by said circuit court in said case.

JAMES H. BEATTY.
HENRY BEATTY.
JNO. D. BEATTY.
DETROIT DRY DOCK COMPANY,
By JOHN D. OWEN, *President.*

Approved:
H. B. BROWN.

EASTERN DISTRICT OF MICHIGAN, *ss:*

Alexander McVittie, of the city of Detroit, in said Detroit, being duly sworn, says that he is secretary and treasurer of the Detroit Dry Dock Company, a corporation existing under and by virtue of the laws of the State of Michigan; that said corporation is seized and possessed of real estate subject to execution within the eastern district of Michigan, over and above all just debts and liabilities, of the value of one hundred thousand dollars; that said real estate is situated in the city of Detroit, Michigan.

A. McVITTIE.

Subscribed and sworn to before me this 24th day of April, A. D. 1882.

D. J. DAVISON,
U. S. Com'r, East. Dist. Michigan.

Filed April 28, 1883.

D. J. DAVISON, *Clerk.*

50 HOWARD M. HANNA *vs.* STEAMBOAT MANITOBA.

The findings of fact and conclusions of law deduced therefrom by the district court, as well as in respect to the exclusion of the Ætna Insurance Company from participating in the money decreed to be paid by the Manitoba until all the other creditors named are paid in full as in respect to the main question involved, are believed

to be correct and are adopted by this court. The proctors will put this finding in proper form, and prepare a decree in conformity therewith, and submit the same for my approval and signature.

The appellants will be taxed with the costs of their respective appeals.

JNO. BAXTER, *Judge, &c.*

Endorsed: No. 6811. U. S. circuit court, east. dist. Mich. In admiralty. Howard M. Hanna *vs.* Steamboat Manitoba, &c. Opinion of Judge Baxter. Rec'd & filed August 8th, 1883. Jno. Graves, deputy clerk.

51 Circuit Court of the United States for the Eastern District of Michigan.

HOWARD M. HANNA and GEORGE W. CHAPIN, Libelants,

vs.

THE STEAMER "MANITOBA," Her Engines, Boiler, etc.

And

JAMES H. BEATTY, HENRY BEATTY, WILLIAM BEATTY, and JOHN D. BEATTY, Cross-Libelants,

vs.

THE PROPELLER "COMET," Her Engines, Boilers, etc.

And

In the Matter of the Petition of THE ÆTNA INSURANCE COMPANY.

1st. These causes having been fully argued by the proctors for the respective parties upon the pleadings and proofs and submitted for the findings of facts and conclusions of law and decree thereon, the court, after full consideration thereof, makes the following findings, to wit:

That the collision between the propeller "Comet" and the steamship "Manitoba" took place between the hours of eight and nine o'clock on the night of the 28th of August, 1875, and at about six or seven miles distant from and to the southward and eastward of White Fish Point, on the south shore of Lake Superior; that at that time said propelier was bound down the lake upon a voyage from Grand Island to Cleveland, Ohio, and when she made the "Manitoba's" light her general course was southward. The "Manitoba" was moving in nearly an opposite direction on a voyage from Sarnia, Ontario, to Duluth, Minnesota. She first made the "Comet's" light when she was between White Fish Point and Point Iroquois, her general course then being northwest half north. The officers of each of the colliding vessels discovered, soon after the "Comet" had rounded White Fish Point, first, the white and soon thereafter the green lights of each other, and they continued to approach each

other on nearly parallel opposite courses, each showing to the other her white and green lights only. Both vessels had the usual complement of officers and men. When they were from one and a half to two miles apart the Manitoba had the Comet's green light about ¾ of a point on her starboard bow. The Manitoba then starboarded her wheel half a point, and continued her course without change until just before the collision. In the meantime the Comet ported her wheel for the 2nd time half a point, and the two vessels thus continued to approach each other, showing their green and white lights only, until they had come within from 400 to 500 feet of each other, the Comet being then from 200 to 300 feet on the starboard side of the Manitoba, and if each had kept their respective courses they
52 would have passed without colliding; but at this juncture the Comet ported her wheel, displayed her red light, and suddenly sheered across the Manitoba's course. The Manitoba thereupon starboarded her wheel, and the collision ensued. At the time the Manitoba was running about eleven and the Comet about nine miles an hour. The Manitoba struck the Comet on her port bow, which caused her to sink in about two minutes, whereby she and her cargo were irrecoverably lost and the Manitoba quite severely injured. Neither of said vessels sounded any signal of the whistle indicating the side it intended or desired to take, nor did either of them reverse its engine or slacken its speed until the collision was inevitable, but the Manitoba did, just before or about the time it collided with the Comet, reverse its engine. The fact that the two vessels were moving on nearly parallel opposite, but strictly converging, lines was manifest and apparent to the officers of both for some considerable time before the Comet ported and run across the Manitoba's course, as hereinbefore stated, nevertheless neither, as hereinbefore stated, slackened speed, changed its course, or signaled its intentions. The relative courses of these vessels and the bearing of their lights and the manifest uncertainty as to the Comet's intentions, in connection with all the surrounding facts, called for the closest watch and the highest degree of diligence on the part of both with reference to the movements of the other, and it behooved those in charge of them to be prompt in availing themselves of any resource to avoid, not only a collision, but the risk of such a catastrophe. If the requisite precautions had been observed by both or by either of said vessels the collision, in the opinion of the court, would not have happened. Each vessel misapprehended the purposes of the other. The Comet was endeavoring to apply article 18 of chapter 5, title "Commerce and Navigation," of the Revised Statutes of the United States, while the Manitoba probably believed until the Comet's sudden sheer across her bow that the Comet intended to pass on her starboard side. It was this misapprehension on the part of said respective vessels, which might have been timely obviated by proper signals from either, that occasioned the collision.

2nd. The court further finds that—

At the time of the collision the value of the "Comet" and her appurtenances was	$25,000	
The value of the cargo of the "Comet" and pending freight was	32,441	88
And the total damages suffered by the owners of the Comet and cargo by reason of said collision is the sum of	$57,441	88
With interest thereon at the rate of six per cent. per annum from August 28, 1875, to November 20, 1883, the date of this decree, amounting in all to the sum of	85,818	16
That the value of the "Manitoba" and her freight pending at the time of said collision was duly appraised under the order of the district court and the proceedings had therein pursuant to sections 4283 to 4286, inclusive, of the Revised Statutes of United States, and security was filed for such appraised value in the sum of	28,694	95
53 And that the owners of the "Manitoba" suffered damages by said collision in the sum of	5,000	00
With interest thereon at the rate of six per cent. per annum from Aug. 26, 1875, to Nov. 20, 1883, the date of this decree—in all the sum of	7,470	

That the owners of both vessels claimed and are entitled to the benefit of sections 4283 to 4286, inclusive, of the Revised Statutes of the United States.

That the cause was heard in the district court upon pleadings and proofs, and that the findings of the district judge before whom said causes were tried are set forth in his opinion, which is hereunto annexed and marked A; that a decree was entered in said district court, finding both vessels in fault, and that the owners of the Manitoba appealed from said decree, but no appeal therefrom was taken by the owners of the "Comet."

And from these facts the court deduces the following conclusions of law:

1st. That said vessels were not meeting end on or nearly end on, within the meaning of article 18 of chapter 5 of title XLVIII of "Commerce and Navigation" of the Revised Statutes of the United States, and that the Manitoba was not, in view of the circumstances of the case, in fault for starboarding her wheel just prior to said collision.

2nd. That the immediate or proximate cause of the collision was the putting by the Comet of her wheel hard-a-port, as herein previously found, and endeavoring to cross on the port side of the Manitoba, and that she was in fault for so doing.

3. That the Manitoba was in fault in ignoring the fact that the Comet was approaching under a port wheel, and that the courses of the two vessels were convergent and involved risk of collision, and in failing to take proper precaution in time to prevent the collision which afterwards occurred.

4th. That she was further in fault in not indicating her course by her whistle, and for not slowing up and in failing to reverse her engine until it was too late to accomplish anything thereby.

5th. That both vessels were in fault in failing to take necessary and proper precautions against collision, which the circumstances manifestly required, and that the damages occasioned by said collision ought to be equally apportioned between said two vessels.

6. That the libellants are entitled to recover from the owners of the Manitoba and their sureties on appeal to this court, by reason of the proceedings had under sections 4283 to 4286, inclusive, of the Revised Statutes of the United States, only the sum [of] twenty-eight thousand six hundred and ninety-four and $\frac{95}{100}$ dollars ($28,694.95), and interest thereon from March 7th, 1882, the date of the decree of the district court, to the date of the decree of this court herein—in all the sum of — dollars, together with the costs of said libellants in this court on the appeal, of said owners of said Manitoba from the decree of the district court on the libel and cross-libel herein.

7. That to the extent of said sum of twenty-eight thousand
54 six hundred and ninety-four and $\frac{95}{100}$ dollars, that being the appraised value of said steamer Manitoba and her freight pending at the time of said collision, the libellants are entitled to enforce and collect payment of their damages occasioned by said collision against the claimants of said steamer Manitoba and their surviving surety on the stipulation filed in the district court for said appraised value.

8. That by reason of the total loss of the Comet and her cargo by said collision, and the provisions of said sections 4282 to 4286, inclusive, of the Revised Statutes of the United States, and the fact that one moiety of the damages suffered by the libellants far exceeds the damages suffered by the owners of the Manitoba and interest thereon, the owners of the Manitoba are not entitled to recover any sum whatever from libellants.

9. That the decree of the district court was right and should be affirmed with costs of this court, to be taxed, in favor of libellants, and interest on said sum of twenty-eight thousand six hundred and ninety-four and $\frac{95}{100}$ dollars, the appraised value of said steamer Manitoba and her freight pending as aforesaid from March 7th, 1882, the date of the decree of the district court to the date of this decree, which said sum, with interest thereon as aforesaid, and also the taxed costs of this court, not extending in all the sum of thirty-five thousand dollars, said libellants are entitled to enforce and collect of the stipulators on the bond or stipulation on appeal to this court, and said bond or stipulation shall be exhausted before recourse shall be had for collection upon the bond or stipulation filed in this district court for the appraised value of said steamer Manitoba and her freight then pending.

JNO. BAXTER, *Judge, &c.*

Endorsed: 6811. Howard M. Hanna *et al. vs.* Steamer Manitoba. Libel and cross-libel. Special findings. Filed in clerks office Dec. 26, 1883. Walter S. Harsha, clerk.

55 *Appeal in Admiralty from the District Court on Libel and Cross-Libel for Collision.*

Circuit Court of the United States for the Eastern District of Michigan.

HOWARD M. HANNA & GEORGE W. CHAPIN, Libelants,

vs.

THE STEAMER MANITOBA, Her Engines, Boilers, Boats, &c.

And

JAMES H. BEATTY, HENRY BEATTY, WILLIAM BEATTY, & JOHN D. BEATTY, Cross-Libelants;

vs.

THE PROPELLER "COMET," Her Engines, Boilers, Boats, &c.

And

In the Matter of the Intervening Petition of the ÆTNA INSURANCE COMPANY.

Appeal from district — on petition to share in proceeds.

These causes having been fully argued by the counsel for the respective parties upon the pleadings and proofs herein and submitted for the findings and decree of this court thereon, and the court having taken time to consider of its findings and conclusions and its decree thereon, doth order, adjudge, and decree that the decrees of the district court in said several causes and upon the petition of the Ætna Insurance Company be, and the same are hereby, in all things affirmed.

And it appearing to the court that the said propeller "Comet" and her cargo was totally lost by the collision mentioned in the pleadings in these causes, and that the damages sustained by the libellants and the other parties interested in the cargo and hull of said "Comet," on whose behalf the said libel was filed, amount to the following sums, viz:

The value of the "Comet" and her appurtenances	$25,000 00
And the value of the cargo and pending freight of the Comet	32,441 88
And the total damages suffered by libellants and other said parties interested by reason of said collision is the sum of	57,441 88
With interest thereon at six per cent. per annum from August 26, 1875, to the date of this decree, amounting in all to the sum of	85,818 16
That the owners of the steamer "Manitoba" suffered damages by said collision in the sum of	5,000 00
56 With interest thereon at six per cent. per annum from August 20, 1875, to the date of the decree; in all the sum of	7,470 00

And that both said propeller "Comet" and said steamer "Manitoba" were in fault for said collision and that the damages arising therefrom should be equally divided, and the court doth order, adjudge, and decree that said damages be equally divided.

And it further appearing to the court that the owners of both said vessels claim and are entitled to the benefit of sections 4283 to 4286, inclusive, of the Revised Statutes of the United States, and that pursuant to the proceedings had under said sections of the Revised Statutes the value of the steamer "Manitoba" and her freight pending at the time of said collision was duly appraised at the sum of $28,694.95, and security was filed in the district court for such appraised value, and said steamer "Manitoba" was duly bonded therefor by Henry Beatty and John D. Beatty, claimants, and Robert J. Hackett and Frederick B. Sibley, as sureties, in said sum of $28,694.95 by their bond or stipulation conditioned to abide the decree of the district court and of this court, and consenting that unless they should do so execution should issue against them therefor, which sum is less than one moiety of the damages occasioned by said collision.

And it further appearing to the court that said propeller "Comet" and her appurtenances were insured at the time of her loss in the following-named companies:

In the Mercantile Insurance Company of Cleveland, Ohio, in the sum of	$3,000 00
In the Phœnix Insurance Company of New York, in the sum of	2,500 00
In the Orient Insurance Company, of New York, in the sum of	2,500 00
In the Northwestern Insurance Company of Milwaukee, in the sum of	2,000 00
In the Royal Canadian Insurance Company of Montreal, in the sum of	5,000 00
In the Tradesmen's Insurance Company of New York, in the sum of	2,500 00
In the St. Paul Fire and Marine Insurance Company, in the sum of	1,500 00
That the cargo of said "Comet" was insured at the time of the loss in the St. Paul Fire and Marine Insurance Company, in the sum of	14,500 00
In the Ætna Insurance Company of Hartford, Connecticut, in the sum of	14,000 00

And that each of said companies duly paid the said amount by it respectively insured to the parties entitled to receive the same, and that each of said companies, with the exception of the Ætna
57 Insurance Company, contributed or agreed to contribute to the libellants' costs and expenses in carrying on this action before the rendition of the interlocutory decree of the district court in the causes, but said Ætna Insurance Company did not so contribute or agree to contribute, but refused so to do, and that the original libel herein is brought as well in behalf of the said con-

tributing insurance companies as for said libellants, Hanna and Chapin.

It is therefore ordered, adjudged, and decreed that said libellants, Howard M. Hanna and George W. Chapin, do receive of and from said James H. Beatty, Henry Beatty, William Beatty, and John D. Beatty, claimants of said steamer "Manitoba" and appellants herein, and of and from the Detroit Dry Dock Company, their surety on the bond or stipulation on appeal, filed in this court the sum of $28,694.95, and the further sum of $3,395.50, being the interest at six per cent. per annum on the aforesaid sum of $28,694.95 from the 7th day of March, 1882, the date of the decree of the district court, to the date of the decree of this court herein in all, the sum of $32,090.45, together also with the costs of said libellants in this court, to be taxed upon the appeal of said claimants of said steamer "Manitoba" from the decree of the district court on said libel and cross-libel.

And it further appearing to the court that said Robert J. Hackett, one of the sureties on the bond or stipulation filed in the district court for the appraised value of the steamer "Manitoba" and her freight, as aforesaid, has deceased, it is therefore ordered, adjudged, and decreed that said libellants, Howard M. Hanna and George W. Chapin, do recover of and from the said James H. Beatty, Henry Beatty, William Beatty, and John D. Beatty, claimants to the steamer "Manitoba," and Frederick B. Sibley, their surviving surety upon the bond for the appraised value of said steamer "Manitoba" and her freight, pending at the time of the collision mentioned in the pleadings of this cause the sum of $28,694.95, in case of non-payment thereof by the claimants and their surety on appeal to this court.

And that said libellants, Howard M. Hanna and George W. Chapin, have execution for the damages and costs to them adjudged and decreed by the judgment and decree of this court against said claimants, James Beatty, Henry Beatty, William Beatty, and John D. Beatty, and the Detroit Dry Dock Company, their surety on the bond or stipulation given by said claimants on appeal to this court, for the aforesaid sum of $28,694.95, and said further sum of $3,395.50 as interest thereon, and for the costs of said libellants in this court to be taxed.

And it is further ordered, adjudged, and decreed that for the recovery of the damages decreed to libellants by the decree of the district court and of this court libellants have execution against James H. Beatty, Henry Beatty, William Beatty, and John D. Beatty, claimants, and said Frederick B. Sibley, their surviving surety on the bond or stipulation for the appraised value of said steamer "Manitoba" and the freight, pending as aforesaid, in and for the
58 amount of $28,694.95, the appraised value thereof as aforesaid, provided proceedings shall be had on the bond or stipulation given on appeal to this court by said claimants of said steamer "Manitoba," before recourse shall be had for collection on the bond or stipulation filed in the district court for the appraised value of the steamer "Manitoba" and her freight, pending at the time of said collision.

And it is further ordered, adjudged, and decreed that the petition of the said Ætna Insurance Company be, and the same is, all denied, with costs of this court and of the district court to be taxed, and that said libellants have execution thereof against said Ætna Insurance Company of Hartford, Connecticut, and Eber Ward and James E. Dickinson, the stipulators on the bond or stipulation on appeal to this Court.

Judge Brown did not sit in this case.

Endorsed: 6811. Circuit court of the United States for the eastern district of Michigan. Howard M. Hanna *et al.*, libellants and appellees, *vs.* The Steamer "Manitoba," and John D. Beatty *et al.*, libellants & appellees, *vs.* Propeller "Comet," and in the petition of Ætna Insurance Company. Draft of final decree. Filed & entered March 18, 1884. Walter S. Harsha, clerk.

59 At a session of the circuit court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment, at the district court-room in the city of Detroit, on Wednesday, the nineteenth day of March, in the year one thousand eight hundred and eighty-four.

Present: The Honorable John Baxter, circuit judge, and the Honorable Henry B. Brown, district judge.

On Libel and Cross-Libel for Collision.

HOWARD M. HANNA and GEORGE W. CHAPIN, Libellants,

vs.

THE STEAMER MANITOBA, Her Engines, &c.,

and

JAMES H. BEATTY, HENRY BEATTY, WILLIAM BEATTY, and JOHN D. BEATTY, Cross-Libellants,

vs.

THE PROPELLER COMET, Her Engines, &c.,

and

In the Matter of the Intervening Petition of the ÆTNA INSURANCE COMPANY.

And now come the said James H. Beatty, Henry Beatty, William Beatty, and John D. Beatty, claimants of the said Steamer Manitoba, respondents and claimants under the original libel and libellants in the cross-libel in said cause, and claim an appeal from the judgment and decree of this court rendered in said cause on the 18th day of March, 1884, to the Supreme Court of the United States, which appeal is now allowed by the court and an appeal bond is ordered by the court in the penal sum of $40,000, to be executed by said appellants in said cause, with sufficient sureties, to be approved according to the course and practice of this court in such causes.

Judge Brown did not sit in this case.

60 THE UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Eastern District of Michigan.

I, Walter S. Harsha, clerk of the circuit court of the United States for the eastern district of Michigan, do hereby certify and return to the claim of appeal claimed and allowed by the court in the case of Howard M. Hanna and George W. Chapin, libellants, against The Steamer Manitoba, her engines, &c., and James H. Beatty, Henry Beatty, William Beatty, and John D. Beatty, cross-libellants, against the Propeller Comet, her engines, &c., that the above and foregoing are true copies of the libel, attachment, stipulation to answer, judgment, stipulation for costs, answer to libel, cross-libel, answer to cross-libel, interlocutory decree, commissioner's report of damages, final decree [in] district court, appeal from district court, bond on appeal, opinion of circuit judge, special findings, final decree, claim of appeal, order allowing appeal, bond on appeal, opinion of district judge, as the same appear of record and on file in my office; that I have compared said copies with the originals and they are true and correct transcripts therefrom and of the whole thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Detroit, in said district, this thirtieth day of July, in the year one thousand eight hundred and eighty-four, and of the Independence of the United States of America the one hundred and ninth.

[Seal of the Circuit Court, Eastern District of Michigan.]

WALTER S. HARSHA, *Clerk.*

Endorsed on cover: E. Michigan C. C. U. S. No. 289. James H. Beatty, Henry Beatty, William Beatty, and John D. Beatty, claimants of the steamer "Manitoba," appellants, *vs.* Howard Melville Hanna and George W. Chapin, owners of the propeller "Comet." Filed 8th September, 1884.

122-97

Office Supreme Court U. S.
FILED.
APR 25 1887
JAMES H. McKENNEY.

Supreme Court of the United States

JAMES H. BEATTY, HENRY BEATTY, WILLIAM BEATTY AND JOHN D. BEATTY, Owners of the Steamer Manitoba,

Appellants,

vs.

HOWARD M. HANNA AND GEORGE W. CHAPIN, Owners of the Propeller Comet,

Appellees.

In Admiralty. Appeal from the Circuit Court for the Eastern District of Michigan.

BRIEF FOR APPELLANTS.

WILLIAM A. MOORE,
F. H. CANFIELD,
Advocates.

DETROIT:
JOHN F. EBY & CO., BOOK AND JOB PRINTERS.
1887.

SUPREME COURT OF THE UNITED STATES.

JAMES H. BEATTY, HENRY BEATTY, WILLIAM BEATTY AND JOHN D. BEATTY, Owners of the Steamer Manitoba,

Appellants,

vs.

HOWARD M. HANNA AND GEORGE W. CHAPIN, Owners of the Propeller Comet,

Appellees.

In Admiralty. Appeal from the Circuit Court for the Eastern District of Michigan.

BRIEF FOR APPELLANTS.

This is a cause of collision, which occurred in the evening of August 28th, 1875, on Lake Superior, between the propeller Comet and the steamer Manitoba. The propeller was an American, and the steamer a Canadian vessel.

The original libel was filed by the owners of the Comet. It alleges that the Comet, at the time of the collision, was on a voyage from Grand Island, Lake Superior, for the port of Cleveland, laden with a cargo of pig iron, copper ore, silver ore, and wool, owned by various parties; that after rounding Whitefish Point she made the white light of the Manitoba, and shortly after her red light off the port bow of the propeller, and at a distance that ordinary lights of such a steamboat would be seen on such a night, it being clear; that at the time, the Manitoba was bound up the lake on a nearly parallel opposite course to that of the Comet;

that the Comet proceeded on her course, holding the red light of the Manitoba off her port bow, and by proper porting of her helm, and by a single blast of her whistle, and by stopping her engine, did all that the law required, or all that it was possible for her to do, to avoid the steamer; but that the officers of the Manitoba, disregarding their duties, instead of porting and taking other measures to avoid the Comet, took no measures to avoid her, but, on the contrary, starboarded her wheel and ran into the Comet, striking her on her port bow fifteen or twenty feet abaft of her stem, so that she sunk in less than two minutes.

The specific faults which the libel charges against the Manitoba are:

1. That she did not have proper officers and men on duty and at their posts.
2. In not porting.
3. In not signaling or answering signals.
4. In not stopping engine.
5. In starboarding when she should have ported.

The answer of the Manitoba denies the allegations of fault charged in the libel. It denies that the Comet had the necessary complement of officers and men properly stationed and upon the lookout for the safety of their vessel. It alleges that the steamer was on a voyage from Sarnia, Ontario, to Duluth, Minnesota, laden with a cargo of general merchandise and about 45 passengers; that she was tight, staunch and strong, well officered and manned; that her signal lights were properly placed and burning brightly; that when she was about half way between Round Island and Point Iroquois, and at about eight o'clock in the evening, her watch made the Comet's bright light approaching from the direction of Whitefish Point, and heading upon nearly, if not quite, a parallel opposite course to that of the Manitoba; that the speed of the Manitoba was moderate, and that she was heading about northwest half north; that the

propeller was approaching showing her *white* and *green* lights, bearing from a half to three-quarters of a point upon the starboard bow of the Manitoba; that the Manitoba was starboarded half a point, and steadied on that course; that the propeller continued to approach, showing her *white and green* lights *only*, as if to pass at a fair berth on the starboard side of the Manitoba, until she appeared to be but a short distance off, when she *suddenly* swung in towards *the steamboat and across her bows, as if under a port wheel*; that thereupon the engines of the Manitoba were at once stopped and backed, and every effort was made on her part to avoid the collision, but so near was the propeller, and so short the time, that it was not possible for the steamboat to avoid the collision.

The specific faults on the part of the Comet, as charged in the answer, are:

1. That she did not have competent officers and watch on deck attending to duty.

2. That she did not keep her course and pass said steamboat on her starboard hand, but recklessly attempted to cross the bows of the steamer when she was so near as to make collision probable.

3. That she did not stop and reverse, but kept up a reckless speed in her approach to said steamboat, and when there was risk of collision.

A cross-libel was also filed by the owners of the Manitoba to recover damages which she suffered by the collision, in which the same facts are set forth as in the answer.

To this cross-libel the owners of the Comet filed an answer, which contains substantially the same averments respecting the cause of the collision as are contained in the original libel.

The issue between the two vessels, according to averments contained in the pleadings filed by their respective owners, may be succinctly stated as follows:

It is claimed on the part of the Comet that she was running a southerly course from Whitefish Point, and that the Manitoba was approaching on a nearly opposite parallel course on her port bow; that each vessel was exhibiting to the other her *red* light, so that if no change was made by either, they would have passed each other on the *port* side.

On the part of the Manitoba it is claimed that the vessels were approaching each other on nearly opposite parallel courses, but that they were approaching *starboard* bow to *starboard* bow, and exhibiting to each other their *green* lights, so that if there had been no change they would have passed on the *starboard* side.

It is claimed by the Comet that the Manitoba was in fault in *starboarding* her wheel when she should have *ported;* while on the part of the Manitoba it is claimed that the Comet was in fault in porting when she should have *starboarded*, and that this *porting* occurred when the vessels were so near together that it was impossible for the Manitoba to avoid collision.

The cause was heard in the District Court and a decree was there rendered declaring both vessels to have been in fault.

The District Judge found as a matter of fact, that the claim of the Manitoba in respect to the manner in which the two vessels were approaching each other was correct, and that the claim of the Comet was untrue (Record, p. 23). He found specifically that the Comet, instead of being on the Manitoba's port bow seeing the Manitoba's red light, was in fact, as alleged by the Manitoba, on the latter's starboard bow, and that the two vessels were exhibiting to each other, not their *red*, but their *green* lights, and that it was the duty of each to have kept her course; and that the Comet was in fault in porting and running across the bows of the Manitoba.

In his opinion the District Judge says:

"Upon careful perusal of this testimony, I am forced to "the conclusion that these vessels were mutually displaying "their green lights, *and that the collision was brought about "primarily by the unauthorized porting of the Comet"* (Record, p. 25).

The Manitoba was also found in fault in not sooner stopping and reversing her engine, and a decree was entered dividing the damages.

From this decree an appeal was taken to the Circuit Court by the owners of the Manitoba. No appeal was taken by the owners of the Comet. The Circuit Court affirmed the decree of the District Court, and the owners of the Manitoba have now appealed to this court. The cause stands now for hearing upon special facts and the conclusions of law found by the Circuit Judge, which may be stated as follows:

1. That the collision took place between the hours of 8 and 9 o'clock on the night of August 28th, 1875, on Lake Superior, to the southward of Whitefish Point.

2. That the propeller was bound down the lake, and when she made the Manitoba's light her general course was southward; that the Manitoba was moving in nearly an opposite direction on a voyage from Sarnia, Ontario, to Duluth, her general course being N. W. ½ N. The officers of each vessel, soon after the Comet had passed Whitefish Point, discovered the *white and green* lights of each other, and that the vessels continued to approach each other on nearly parallel opposite courses, each showing to the other her *white and green* lights *only*.

3. That when they were from 1½ to 2 miles apart the Manitoba had the Comet's green light about ¾ point on her starboard bow; the Manitoba then starboarded her wheel half a point and continued her course without change until

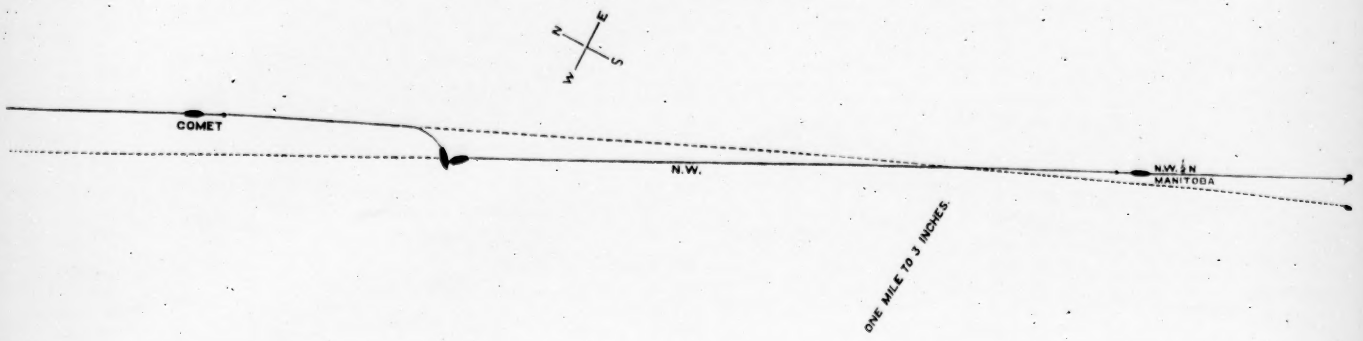
just before the collision. In the meantime the Comet ported her wheel for the second time half a point, and the two vessels thus continued to approach each other, showing their *green* and *white* lights *only*, until they had come within from 400 to 500 feet of each other, the Comet then being from 200 to 300 feet on the starboard side of the Manitoba, and if each had kept their respective courses, they would have passed without colliding; but at this juncture the Comet *ported* her wheel, displayed her red light, and *suddenly sheered across the Manitoba's course*. The Manitoba thereupon starboarded her wheel, and the collision ensued. At the time the Manitoba was running about 11 and the Comet about 9 miles an hour.

4. The Manitoba struck the Comet on her port bow, which caused her to sink in about two minutes. Neither of said vessels sounded any signals of the whistle indicating the side it intended or desired to take, nor did either of them reverse its engine or slacken its speed until the collision was inevitable; but the Manitoba did, just before the time it collided with the Comet, reverse its engine (Record, p. 35).

And from these facts the court deduced the following conclusions of law:

1. That said vessels were not meeting end on, or nearly end on, within the meaning of Article 18 of Chapter 5, title XLVIII of Commerce and Navigation, of the Revised Statutes of the United States, and that the Manitoba was not, in view of the circumstances of the case, in fault for starboarding her wheel just prior to said collision.

2. That the immediate or proximate cause of the collision was the putting by the Comet of her wheel hard aport, as herein previously found, and endeavoring to cross on the port side of the Manitoba, and that she was in fault for so doing.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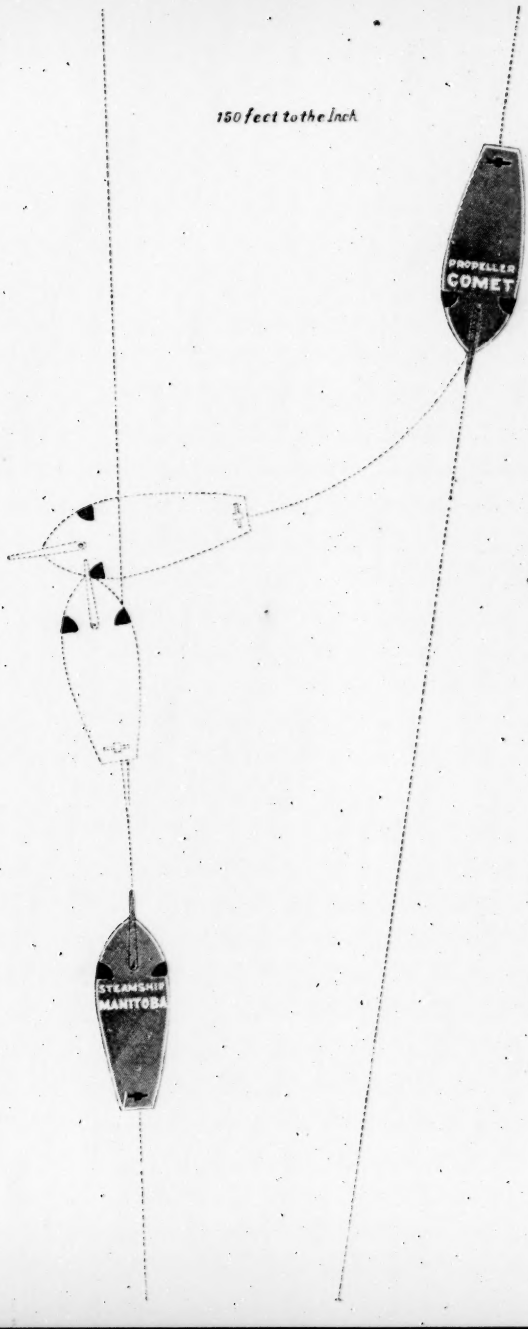
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PROPELLER
COMET
STEAMSHIP
MANITOBA

3. The Manitoba was in fault in ignoring the fact that the Comet was approaching under a port wheel, and that the courses of the two vessels were convergent and involved risk of collision, and in failing to take proper precaution in time to prevent the collision which afterwards occurred.

4. That she was, in fault in not indicating her course by her whistle, and for not slowing up, and in failing to reverse her engine until it was too late to accomplish anything thereby.

5. That both vessels were in fault in failing to take necessary and proper precautions against collision, which the circumstances manifestly required, and that the damages occasioned by said collision ought to be equally apportioned between them (Record, pp. 36 and 37).

The Circuit Judge further states that, "the fact of two vessels moving on nearly parallel opposite but strictly converging lines was manifest and apparent to the officers of both, for some considerable time before the Comet ported and ran across the Manitoba's course, as hereinbefore stated. Nevertheless, neither, as heretofore stated, slackened speed, changed its course, or signaled its intentions. The relative courses of these vessels, and the bearing of the lights, the manifest uncertainty as to the Comet's intentions, in connection with all the surrounding facts, called for the closest watch and highest degree of diligence on the part of both with reference to the movements of the other; and it behooved those in charge of them to be prompt in availing themselves of any resource to avoid not only a collision, but the risk of such a catastrophe. If the requisite precautions had been observed by both, or by either of said vessels, the collision, in the opinion of the court, would not have happened. Each vessel misapprehended the purposes of the other. The Comet was endeavoring to apply Article 18 of

Chapter 5, title 'Commerce and Navigation,' of the Revised Statutes of the United States, while the Manitoba probably believed, until the Comet's sudden sheer across her bow, that the Comet intended to pass on her starboard side. It was this misapprehension on the part of said respective vessels, which might have been timely obviated by proper signals from either, that occasioned the collision."

The last paragraph, in our view of the case, cannot be taken as a statement of a finding of fact, but rather as a conclusion which the Circuit Judge deduced from the facts found by him and already stated; or as a statement of the reasons why he found the facts to be as previously above stated.

As the case comes before this court upon the pleadings, and the facts found by the Circuit Judge, the question presented is simply whether, under the facts, the Manitoba is to be held to have been guilty of fault which should render her liable for the collision.

The finding of facts stands as a special verdict in a case at law. The only question to be considered is whether the decree condemning the Manitoba can, as a matter of law, be sustained upon the facts found.

The Abbottsford, 98 U. S., 440.
The Benefactor, 102 U. S., 214.
The Adriatic, 103 U. S., 730.
The Annie Lindsley, 104 U. S., 189.
The New Orleans, 106 U. S., 13.

ASSIGNMENTS OF ERROR.

The appellants say that the decree of the Circuit Court is erroneous in the following particulars:

1. Because the Circuit Judge erred in holding that the Manitoba was in fault in ignoring the fact that the Comet was approaching under a port wheel, and that the courses of the two vessels were convergent and involved the risk of collision, and in failing to take proper precautions in time to prevent the collision.

2. That the Manitoba was in fault in not indicating her course by her whistle, and in "not slowing up," and in failing to reverse her engine.

3. In holding that both vessels were in fault in failing to take proper and necessary precautions against collision, which the circumstances required, and that the damage occasioned by such collision should be equally apportioned between said two vessels; it appearing from the facts, that the Comet alone was in fault, and that the libel filed against the Manitoba should be dismissed.

4. In holding that the original libelants were entitled to recover against the owners of the Manitoba the sum of $28,694.95, the value of said steamer Manitoba and her freight pending, with interest and costs.

5. Because the said Circuit Court also erred in not holding that the Comet was wholly in fault for said collision.

6. Because under the facts found the vessels were approaching upon substantially parallel lines, each showing to the other her green light, and when on such courses, and when the Comet was within 400 or 500 feet of the Mani-

toba, she would have passed the Manitoba safely, on her starboard side at a distance of 200 or 300 feet had she held her course; but that instead of holding her course, she suddenly ported and endeavored to cross to the port side of the Manitoba, and she should therefore have been held wholly in fault for the collision.

I.

No appeal having been taken on behalf of the Comet, either from the decree of the District Court or the decree of the Circuit Court, it cannot now be contended in her behalf that those decrees, or any of the findings of the Circuit Court against her are erroneous.

As against the Comet, the findings of the Circuit Court are *res judicata*. Only the party appealing can dispute the correctness of the decree or decision appealed from. This has been decided repeatedly by the courts of this country, and of England.

The Wm. Bagaley, 5 Wal., 412.
Aisey vs. Morrell, 2 Curtis, 8.
Allen vs. Hatch, 2 Curtis, 147.
Canter vs. Ins. Co., 3 Peters, 317.
The Comet, 9 Blatch., 323.
The Quickstep, 2 Bissell, 282; 9 Wal., 665.
The Maybey and Cooper, 14 Wal., 204.
The City of Antwerp and the Friedrich, L. R., 2 P. C. Ap., 25.

The owners of the Comet can dispute neither the facts found by the Circuit Court, nor the conclusions which it has deduced therefrom. As against *them* the findings of law, as well as of fact, are to be treated *res judicata*. Not having appealed, they can only be heard in support of those findings.

The owners of the Comet must, in this court, be regarded

as conceding, not only that their vessel was in fault for the collision, but that she was guilty of the *specific faults* which the court below has found against her. These findings establish that the case made by their libel is untrue. That instead of exhibiting to the Manitoba a red light as she approached, she exhibited her green light; that instead of being on the Manitoba's port bow, she was from three hundred to four hundred feet on her starboard bow, so that if neither vessel had changed her course, she would have passed the Manitoba in safety on that side. But that instead of doing so, she "*suddenly*," and without warning or signaling her intention, put her wheel "hard-a-port," and so threw herself across the Manitoba's bows.

This, we repeat, must now be regarded as being conceded by the appellees. It only remains, therefore, to be considered, whether under these circumstances, a case is made, which justly authorizes the owners of the Comet to claim at the hands of the appellants a contribution to the damages occasioned by the collision, which was primarily caused by the misconduct of their own vessel.

While the fact that the Comet was in fault for the collision, is not now open for discussion, still the *degree* of her fault, the *character* of her transgression, ought to be considered, because of its importance to the further inquiry as to whether the Manitoba was also in fault.

"When the libelants come into court, themselves showing negligence and want of skill, and seek to cast the burthen of the consequences, in part, upon another vessel, there is some presumption at least adverse to their claim; and they may properly be held to clear proof of contributing negligence or fault in the management of the other vessel; their own negligence sufficiently accounts for their disaster; and it should not be enough that they make the care and skill of the other vessel doubtful."

The Comet, 9 Blatch., 323.

Not only was the Comet guilty of a fault in putting her wheel "hard-a-port" and throwing herself across the bows of the Manitoba, but she was thereby guilty of the *greatest* fault which it was possible for her to commit. She not only did "the wrong thing," but the *worst* thing which it was possible for her to do. Her misconduct was utterly without excuse. It was the efficient "immediate or proximate cause of the collision" (Record, p. 36), and the damage resulting therefrom.

Her owners, the appellees, now ask that the owners of the Manitoba shall be compelled to contribute to the payment of these damages. In this they ought not to succeed, simply by showing that the Manitoba *might have avoided* the Comet, had her officers exercised greater care or vigilance on their part; but they must show that she was guilty of a violation of some rule of navigation, or that there was a want of *ordinary* care and diligence on the part of her officers. She cannot be condemned except the faults charged in the libel are proved against her.

In discussing the findings of the Circuit Court against the Manitoba, we will depart somewhat from the order in which they are stated in the record, and consider first, the one which relates to the speed of the Manitoba; as her supposed fault in this respect is the one upon which the appellees will most strongly rely, in their efforts to sustain the decree from which we have appealed (see finding number 4, Record, p. 37).

As stated in the record, the Circuit Court found that the Manitoba was in fault "in not slowing up, and in failing to reverse her engine."

This really embraces two specifications of fault: 1st, in "not slowing up;" and 2d, in not "reversing her engine."

It is sought to be shown by appellees that the Manitoba was guilty of a violation of Sailing Rule No. 21, which

provides: "*Every steam vessel, when approaching another vessel, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse.*"

See Rev. Statutes, § 4233.

Under this rule it may be the duty of a steamer to slacken speed, when it is not her duty to stop and reverse. The duty to slacken speed may, and usually does, arise before the duty to stop and reverse becomes incumbent.

So in this finding there is a charge, 1st, of not slackening speed, or not "slowing up;" 2d, of "not reversing."

In behalf of the appellants we submit:

II.

THAT THE MANITOBA WAS NOT IN FAULT FOR NOT SLACKENING SPEED, AND THAT THE FINDING OF THE CIRCUIT COURT IN THIS RESPECT WAS ERRONEOUS.

Upon this point we observe:

1. That no allegation is made against the Manitoba in the pleading on account of improper speed; neither in the libel, nor in the cross-libel is there any proper averment or intimation that she was in fault in this respect.

The only charges of fault in the libel are:

a. A want of proper officers and men on duty.

b. In not porting, signaling, answering signals or stopping engine.

c. In starboarding.

The charge of "not stopping engine" can only refer to a failure to stop after the Comet had ported, and swung herself across the Manitoba's bows; or, in other words, after the collision had become inevitable. It certainly cannot be taken as a charge of fault for not "slackening speed," or,

as stated by the circuit judge, in not "slowing up," as the vessels were approaching one another, and before the Comet ported. The duty to slacken speed, under the rule, does not include the duty to stop. Slackening speed is not synonomous with stopping.

The appellants were only called upon to meet the case made against them in the libel; and their vessel ought not to be condemned for any fault not there charged against her.

As was said by Lord Westbury, in the *City of Antwerp and the Freidrich*, L. R., 2 P. C. App., 30, "According to the settled rules of the administration of justice, the party against whom judgment is given is entitled to know from the complaint of his adversary what is the default or misconduct imputed to him, that he may have an opportunity of meeting the case by his defense, and also by his evidence. And it is difficult to suppose a greater case of hardship than that a defendant, after having met and disproved the case made by the plaintiff, should yet have judgment pronounced against him upon the same ground of complaint which was neither pleaded by his adversary nor stated in argument during the discussion of the case."

Now, it is evident that *the* fault charged in the libel against the Manitoba is that of improperly starboarding. It was this case which the appellants were called upon to meet, and not a case of improper speed on the part of the Manitoba as the vessels were approaching, and prior to a change of course by either of them.

But waiving this suggestion for the sake of argument, we insist that the facts found do not warrant the conclusion of the Circuit Court in regard to the speed of the Manitoba.

Unless it can be shown that this rule which we have quoted, *ante*, was violated by the Manitoba, she cannot be condemned for improper speed.

1. It will be observed that under the rule the only duty

to slacken speed, is when a steamer is approaching another vessel "*so as to involve risk of collision;*" and we claim that these vessels were not approaching each other so as to involve risk of collision, until the Comet wrongfully ported her wheel, shut in her green light and displayed her red light, "and suddenly sheered across the Manitoba's course."

Up to this point each of the steamers was exhibiting to the other her green light, and they were not approaching "so as to involve risk of collision;" and therefore were justified in proceeding at unabated speed.

Of course it will be conceded, as it has, indeed, become axiomatic, that vessels can never be approaching each other so as to involve risk of collision so long as the green light of one is opposed to the green light of the other, or the red light of one is opposed to the red light of the other.

It is said in the "Rule of the Road at Sea," approved and issued by the Bureau of Navigation in 1868, page 208: "Everyone is unanimous in agreeing that no two ships can come into collision, so long as they show each other the same colored light, green to green, or red to red." And again, at page 209, it is said: "*The following rule should be impressed upon the mind of every sailor, viz.: So long as you keep a green light opposed to a green light, or a red light opposed to a red light, no collision can happen between passing vessels.*"

This construction of the rule has been approved by the courts both of this country, and of England, as is shown by the following cases:

THE FREE STATE, BROWN'S ADMIRALTY, 251; 91 U. S., 200.

This was a collision between the scow Meisel and the propeller Free State, which were approaching each other on the Detroit River, the Meisel displaying her green light, nearly directly ahead. While they were in this position, and in such close proximity as to make collision inevitable

from the movement, the Meisel ported, and, displaying her red light to the propeller, ran across her bows and was sunk. The instant the red light was opened to the Free State every effort was made to arrest her progress. In the District Court both vessels were held in fault—the Meisel for changing her course, and the propeller for not sooner slackening her speed. On appeal to the Circuit Court this ruling was reversed, and it was there held that the Meisel was alone in fault, upon the ground that so long as the green light of the Meisel only was seen, the Free State was justified in maintaining her speed, and that the words "risk of collision" mentioned in the rule "do not include those unexpected violations of law by an approaching ship which a good seaman would not anticipate, in the supposition that there was an experienced master in command." This ruling in the Circuit Court was approved by this court on appeal. Speaking of the situation of the two vessels when the green light of the Meisel was exhibited to the steamer, the Supreme Court say that "there was then no risk of collision; the sixteenth rule did not come into use; and it was not necessary that the steamer should slacken, stop, or reverse. Subsequently, when the vessels were within 300 feet of each other, and probably within three minutes of time, the scow changed her course and practically ran under the bows of the steamer. Then there was risk of collision, but not until then. The steamer, in this emergency, did stop and reverse; but the time was too short, and the distance too small, to prevent the catastrophe." The court further says that the appellant insists that the rule of law is this: That where a "steam vessel is approaching another vessel, and where a collision might be produced by a departure of the latter from the rules of navigation, the former vessel is bound to slacken her speed, or stop and reverse. We have examined with care the authorities cited by the appellants, but we find none that sustain this propo-

sition. The rule is otherwise. If two vessels are meeting each other, end on, or nearly so, where there is plenty of sea room, and a considerable distance from each other, it is not the duty of either to stop, reverse, or slacken. The duty of each is to pass on the port side, and the rate of speed is not an element in the case; the risk of collision is not present under such circumstances."

We submit that the rule laid down by this court in the case of the Free State, disposes of the case at bar. Here there was plenty of sea room. Navigation of the lake was unobstructed by other vessels. The green light of the Comet was seen by the Manitoba on her starboard bow. When they were from one and one-half to two miles apart, that green light bore three-quarters of a point on her starboard bow. The vessels continued to approach each other, green light being opposed to green light, until they had come within four or five hundred feet from each other. At that time the Comet's green light had opened so as to be from two to three points on the Manitoba's starboard bow. The angle at which that light was exhibited had increased. The courses of the steamers had diverged up to that point. They surely were not approaching each other so as to involve risk of collision. They would have passed each other in entire safety, but for the unwarranted, and inexcusable, and entirely unexpected porting of the Comet.

THE ADRIATIC, 107 U. S., 514.

A steamer saw a green light approaching which proved to be on the Harvest Queen, a sailing vessel. "The character of the approaching vessel was not known, nothing but her light being seen; but whether she was propelled by wind or steam, the steamer pursued the proper course to prevent the danger of collision. Her green light must have been equally visible from the Harvest Queen, and when two vessels keep the same colored lights in view of each other, col-

lision is impossible, for they are then moving on parallel lines." The court, page 517, also further say: "Whilst the vessels were over two miles apart, the green light on the Harvest Queen was distinctly seen. A similar light on the Adriatic could easily have been seen, and, if the look-outs were attending to their duty, probably was seen from the ship. Those lights being visible, it was only necessary for the vessels to keep in their course, and collision would have been impossible."

THE ELIZABETH JONES, 112 U. S., 514.

This was a collision on Lake Erie between a schooner and a bark. The officers of the schooner first sighted the green light of the bark about half a point on the starboard bow at a distance of about three miles off, and continued to see the green light of the bark until the vessels were within about a length of each other, when the bark opened her red light. Previous to this the schooner had starboarded, and was struck on her starboard side at about right angles. The court say, to do this, the bark must have changed her course by porting five points, which was no greater change than the Comet made in this case. The court also say, p. 522: "that green light to green light was safety." Again: "The Jones ran into danger by porting; she did not port to avoid collision or immediate danger; she ported when she must have seen all the time that the Willis was going away from her; this porting by the Jones was no part of keeping her course, and it caused the collision. It was a departure by the Jones from the course which the Willis, constantly seeing the green light of the Jones, had a right to think the Jones would keep." And again, it is said: "By starboarding and going away from the green light of the Jones, the Willis took a course of safety, and, in the language of the cases, 'determined the risk.' Even assuming, on the facts found, that these vessels were crossing so as to involve risk of col-

lision, when they first sighted each other, the Willis 'determined the risk' when she had gone off two points by starboarding and brought green light to green light."

We submit that this case fully sustains us in our contention, that so long as the Comet and Manitoba had green light opposed to green light there was no risk of collision; for, as the court says, "green light to green light was safety."

Indeed, if we could make a substitution of names, it would be difficult to distinguish this case of the Elizabeth Jones from the case at bar, so far as the exhibition of lights and the maneuvers of the vessels are concerned, and the decision which held the Jones to be wholly in fault must likewise condemn the Comet and excuse the Manitoba.

THE JESMOND AND THE EARL OF ELGIN, L. R., 4 P. C. Cases, 1.

This was a collision between two steamers, whose combined speed was about 16 knots an hour. The Jesmond's course was N. N. W., and the course of the Earl of Elgin S. E. Each vessel saw the other at a distance of about a mile and a half. The Jesmond at first made the three lights of the Elgin so that the vessels were then meeting end on, or nearly so. Upon seeing the Elgin's three lights the Jesmond paid off under a port helm a point and a half, but was steadied and brought back on her original course so that the two vessels were approaching upon about parallel lines with only half a point difference between them. Both vessels proceeded with unabating speed, and the Earl of Elgin improperly starboarded. The High Court of Admiralty condemned both vessels, holding that the Jesmond was in fault for not porting sufficiently, and also for not slacking her speed. This decree was reversed by the Privy Council. Their lordships say: "The Jesmond having paid off so far as a point and a half was, though brought back within half

a point of her original course when the helm was steadied, placed upon a line on which she would have gone clear of the other vessel if the latter had even kept her course; that she had brought the two vessels in the position of red light to red light, and that the danger of collision was at an end. *A fortiori*, if the Earl of Elgin had obeyed the rule, and had done what she was bound to do, namely, port her helm, the distance between the two vessels would have increased, and the collision would have been still more improbable. That being the state of the case, their lordships cannot concur with the learned judge in thinking that the alleged insufficiency of the porting did in any degree contribute to the accident." It was also held that after the Jesmond ported she was not approaching the Earl of Elgin so as to *involve risk of collision*, red light being opposed to red light, although the courses of the two vessels were only half a point apart, and that the Jesmond was not bound to slacken her speed or stop. The court say: "The article imposes this obligation only upon a ship which is approaching another ship so as to involve the risk of collision. It may be said that there was a moment at which the two vessels were in that condition, for if they had not been in that condition they would not have been within Article 13. But it seems to their lordships, taking the two Articles together, that Article 16 only applies when there is a continuous approaching of two ships." * * * * "If their lordships are right in their view of what was then done, the original risk of collision was determined when the vessels were brought port light to port light. Nor can it be said that after that porting the Jesmond was approaching the Earl of Elgin so as to involve a risk of collision, unless the true construction of the term 'risk of collision' be that for which in one part of his argument Dr. Deane contended. As their lordships understood his argument, he was prepared to insist that the term must be taken to include

either a default on the part of the other vessel to do what the 13th rule required of it, or the disabling of that vessel by some accidental cause of which the Jesmond was not and probably could not be aware. It does not appear to their Lordships that the first of these elements can be reasonably imported into the risk of collision; there is no foundation in fact for supposing that 'the Earl of Elgin was prevented by any accident from doing what she ought to have done;' nor are their Lordships aware, that in obeying these rules it is necessary for persons navigating vessels to foresee and provide against every possible accident."

The case of the *Earl of Elgin* has been expressly approved by this court in the *Free State* and in the *Elizabeth Jones*, already cited.

THE CONTINENTAL, 8 BLATCH., 3.

This was a collision between a steamer and a propeller, which was occasioned, primarily, by the sudden porting of the latter across the steamer's course. The facts, in many respects, were similar to the case at bar. The propeller was seen on the steamer's starboard bow, and being without the proper range lights, was mistaken for a sailing vessel. It was insisted in behalf of the propeller that the officers of the steamer might, by greater vigilance, have discovered, by the position and bearing of the propeller what kind of a vessel she in fact was; one of the principal facts relied upon being that if she had been a sailing vessel her green light, as the steamer advanced, would have changed rapidly more and more to starboard, and it was claimed that the fact that it did not do so was sufficient to show to the officers of the steamer that they were mistaken. This is precisely what is claimed in behalf of the Comet in this case. But it was held that even if this was true, the steamer would not be in fault, for the reasons: 1. That her officers saw the propeller

on the steamer's starboard bow. 2. They also saw her *green* light, and not her red light, until she ported and turned across her course; and the court say that, "*from these two facts, it is a necessary and inevitable result, that the officers of the Continental had no reason to apprehend a collision.* * * * * These two facts being established, there could be no collision, if both vessels kept their course; and the result is, that the accident was wholly *caused by the sudden and unwarranted porting of the propeller, which brought her across the bows of the Continental.*"

See the Alhambra, 25 Fed. Rep., 846.

The rule seems to be clearly established, that the term "risk of collision," as used in the statute, does not include the danger which may ensue if one of the approaching vessels disregards the law, or when by reason of negligence or unanticipated accident, one of the vessels departs from her course. On the other hand, it is fully established by the authority of this court, that when vessels are approaching, green light to green light, or red light to red light, they are not approaching so as to involve risk of collision, and there is no duty to slacken speed. So long as they continue on these courses there is "no risk of collision." "There is no possibility of collision" (91 U. S., 204). This being true, the Manitoba was under no obligation to slacken her speed so long as only the green light of the Comet was seen upon her starboard bow; for, under these circumstances, there was "no possibility of collision."

III.

The Manitoba was not in Fault for not Reversing her Engine.

As we have already stated, it cannot be successfully claimed that she was in fault for not stopping and reversing her engine, so long as the Comet was approaching on her starboard bow, exhibiting only her white and green lights. If the Manitoba was at fault at all in this respect, it was in not reversing her engine *after* the Comet had put her wheel "hard-a-port," and swung across the Manitoba's bows.

The court, however, finds that the Comet neither reversed its engine nor slackened its speed: "but the Manitoba did, just before, or about the time she collided with the Comet, reverse her engine." Could the Manitoba have avoided the collision by stopping and reversing after the porting by the Comet? If she could not, then she is not to be condemned. Now it is evident from the fact that when the Comet ported the vessels were only 400 or 500 feet apart, and were approaching at a combined speed of about 20 miles an hour, that it would be impossible for the Manitoba to have avoided the collision by any effort on her part to stop and reverse. Not more than from 20 to 30 seconds elapsed from the time the Comet ported to the time the collision occurred; the Manitoba had only about her own length to run. The time was too brief and the distance too short.

The bare statement of these facts shows how useless any effort on her part would have been to avoid the collision by any attempt at stopping and backing, after the porting of the Comet took place. Unless the court is prepared to lay down a rule which will require a steamer to slacken speed upon the approach of another vessel upon such a course

that, if it is not departed from, it is clear there can be no collision, the Manitoba cannot be condemned in this case.

It is not enough to show that, if she had reversed or slackened her speed before the Comet ported, the collision would have been avoided. It must also be shown that it was the legal duty of the officer of her deck to have given the order.

The rule requires a steamer to reverse only when it is necessary; only when they are approaching each other so as to involve risk of collision. But in this case they were not approaching each other so as to involve risk of collision, nor was it necessary for the Manitoba to stop or reverse until after the wrongful porting of the Comet had taken place.

In the *Bywell Castle*, *L. R.*, *4 P. D.*, *219*, it was claimed that she was in fault for not stopping sooner. But Brett, L. J., said that her master was not bound to give the order to stop and reverse "until the other ship had done the wrong thing?" *i. e.*, had changed her course.

In the *Scotia*, *14 Wall.*, *170*, it was held that the Scotia was not bound to take any steps to avoid a collision until the ship's light was seen closing in upon her.

Now, under this rule, the Manitoba was under no obligation to slacken speed, or stop and reverse, until the Comet's light was seen closing in upon her; and, under the facts found by the Circuit Court, and which are conclusive here, there was no closing in of the Comet's light until the vessels were within 400 or 500 feet of each other, a distance of about two vessels' length.

Up to that time the angle at which that light was seen from the Manitoba had increased from three-quarters of a point to at least a point and a half or two points. Everything in the bearing of the light indicated that the vessels would pass each other at a safe distance. The Circuit Court finds as a fact, that they would have so passed each other had not the Comet hard-ported her wheel, displayed

her red light, and *suddenly* sheered across the Manitoba's course. That the officers of the Manitoba were not bound to anticipate this wrongful movement on the part of the Comet, or take any steps to guard against it, is well settled. They had the right to assume that she would obey the law and not depart from it.

IV.

The Vessels were not Approaching each other on Convergent Lines which Involved Risk of Collision.

The Circuit Judge, as a conclusion of law, found that the Manitoba was in fault in ignoring the fact that the Comet was approaching under a port wheel, and that the courses of the two vessels were convergent and involved risk of collision (Record, 36). This is stated not as a fact, but as a conclusion of law. We submit that in this there is error.

It is distinctly found, as a matter of fact, that the two vessels approached each other on nearly *parallel opposite* courses, each showing to the other her white and green lights only; that when they were from one and a half to two miles apart the Manitoba had the Comet's green light about three-quarters of a point on her starboard bow; that the Manitoba then starboarded her wheel half a point, and continued her course without change until just before the collision; that in the meantime the Comet ported for the second time half a point, and the two vessels thus continued to approach each other, showing their *green and white lights only*, until they had come within 400 or 500 feet of each other, the Comet then being from 200 to 300 feet on the starboard side of the Manitoba; and that if each had kept their respective courses, they would have passed without colliding.

It is evident from this statement, that up to this time

these vessels were not approaching on convergent courses. When they were a mile or a mile and a half apart, the green light of the Comet was seen about three-quarters of a point on the Manitoba's starboard bow. Now, if their courses were convergent, the Comet would have crossed the course of the Manitoba, at least she would have shut out her green light from the Manitoba long before they came within 400 or 500 feet apart. At all events, the angle at which the Comet's light was seen from the Manitoba would have continually lessened as the vessels approached each other. Instead of this, it is found that when they were 400 or 500 feet apart, the Comet, still showing her green light, was from 200 to 300 feet on the starboard side of the Manitoba. Now, if your honors will place the models of the two vessels in the position described in this finding, it will be clearly seen, that instead of the angle at which the green light was seen, diminishing, it gradually increased up to the time she suddenly ported and sheered across the Manitoba's course. It will be seen that at the time the Comet ported, her green light was at least two points on the starboard bow of the Manitoba, which shows very clearly that their lines of approach were not convergent. And it also shows that to have thrown herself across the bows of the Manitoba, the Comet must have ported at least three points while running a distance of a little more than twice her length.

But when we consider that both vessels were in motion, and that their combined speed was about twenty miles an hour, and that the Manitoba was somewhat the faster of the two, it will be seen that under a hard-a-port wheel the Comet would have changed her course at least four or five points before the collision occurred.

The Circuit Judge, in what may be termed his *opinion*, as distinguished from any specific *finding* of *fact* (Record, p. 35), says: "The fact that the vessels were *moving* on nearly parallel, opposite, but strictly converging, lines, was

manifest, and apparent to the officers of both for some considerable time before the Comet ported and ran across the Manitoba's course," etc.

Even if this was correct, it would not of itself create a necessity for the Manitoba to slacken her speed. The rule does not require a steamer to slacken her speed, simply because another ship is approaching her on a "strictly converging line." They must, in order to create this duty, be approaching each other in such a manner as to *involve risk of collision*. Converging lines do not necessarily imply a risk of collision. If each vessel exhibits to the other her white and green lights only, and there is no closing in of the green light, no "coming into line" of the green and the white, they are not, and cannot be approaching each other so as to involve risk of collision, although their lines may be "strictly converging."

Unless the point at which the line of the Comet would intersect that of the Manitoba, was ahead of the Manitoba, there could be no risk of collision.

"If the vessels were not crossing each others tracks, they were on lines of perfect safety, and there was no just ground to apprehend collision until the propeller ported. If they had been crossing, still, as the (Manitoba) had the propeller on her own starboard side, it was the duty of the propeller to keep her course."

The Continental, 8 Blatch., 3.
Rule 19, Revised Statutes, § 4233.

It is manifestly the theory of the law, and the regulation which have been adopted respecting the lights which a vessel should carry, that her course is supposed to be indicated by the color of the light which she exhibits to an approaching vessel; and that the duty of the approaching vessel is to be determined by the color of the light which she sees upon the other.

These lights speak "the language of the seas" in terms which are understood by every mariner. And as the Comet approached the Manitoba, exhibiting only her white and green light, she proclaimed in terms which could not be misunderstood, in terms which were neither ambiguous nor doubtful, that she was upon a course which did not involve a risk of collision, and which would carry her safely past the Manitoba.

Had her course been one which involved danger, she would have proclaimed it by the appearance of her lights long before the vessels had come within 400 or 500 feet of each other. She would have done this by closing in her green light and bringing it into line with her white light; and this would have been followed by the exhibition of her red light.

But this was not done. The court has found no fact which sustains any such theory. She continued to approach, showing her green light at an angle which continually increased until she was within 400 or 500 feet of the Manitoba, and then with a reckless disregard of every obligation resting upon her, without warning, without any indication of her purpose, she *suddenly* put her wheel *hard-a-port*, and threw herself athwart the Manitoba's bows.

To condemn the Manitoba for the collision which ensued, the court must find, notwithstanding the Comet proclaimed in unmistakable language that she would pass on the starboard side, that it was the duty of the Manitoba to anticipate that the Comet would violate her own word, disregard the law, and recklessly and without excuse "*suddenly*" put her wheel "hard-a-port," and so make the collision inevitable.

That the Manitoba was not bound to anticipate this violation of the law on the part of the Comet, and that she had the right to assume that the Comet would continue on her

course, which would have carried the vessels past each other in safety, has been decided in many cases.

THE ARIADNE, 7 BLATCH., 213.

In this case, Judge Woodruff says, that "vessels have a right to assume that other vessels, if in their neighborhood, are acting in obedience to the statute regulations; and, where the negligence of a sailing vessel, and her failure to comply with the statute have led the steamer into danger of collision, it is not for the sailing vessel to insist that, by more than usual vigilance, she might, nevertheless, have been discovered at a few yards greater distance, and to claim contribution on that ground."

THE SCOTIA, 7 BLATCH., 308; AFFIRMED 14 WALL., 176.

In this case, it was held that upon discovering the Berkshire's light it was the duty of the Scotia to see if there was reason to apprehend danger. If she saw the light and observed it diligently, without having reasonable grounds of apprehending collision, no duty to slacken speed or change her course was created.

Let us apply this rule to the Manitoba. The Comet had approached her, showing only her green and white lights at an ever increasing angle, until they were within 400 or 500 feet of each other; certainly the officers of the Manitoba had no reasonable ground to apprehend a collision, therefore they were not bound to change their course or slacken speed.

THE CONTINENTAL, 8 BLATCH., 3.

"The faulty party cannot, for his own protection, demand of the other extraordinary diligence and skill." * * * "Approaching vessels *have a right* to expect compliance with the law, and exercise their judgment accordingly." "If they actually exercise proper vigilance and skill, and yet are in fact misled, they are not responsible that, under

circumstances apt to create doubt, their judgment was in fact deceived."

THE ELIZABETH JONES, 112 U. S., 521.

In this case, which we have already cited, the court say: "The Jones ran into danger by porting; she did not port to avoid collision or immediate danger; she ported when she must have seen all the time that the Willis was going away from her. This porting by the Jones was no part of keeping her course, and it caused the collision. It was a departure by the Jones from the course which the Willis, constantly seeing the green light of the Jones, had a right to think the Jones would keep," etc.

Under the facts found by the Circuit Court, there is no such showing of contributory negligence on the part of the Manitoba as will justify a decree against her, or entitle libelants to a recovery of any portion of the damages against her owners.

To justify such a decree, it is not sufficient to show that by the exercise of more than ordinary care on the part of the officers of the Manitoba, the collision might have been avoided. The highest degree of care and skill is not required in such a case. But it must be shown that the officers of the Manitoba knew, or that they, by the exercise of *ordinary* care could have ascertained, that the Comet would change her course in the manner which she did.

In *Williamson vs. Barrett*, 13 How., 101, it was contended that the collision could have been avoided if the respondent's boat had reversed her engine and backed. But the court say: "Before the neglect to make that movement could be charged as a fault, it should have appeared that the master knew the colliding boat intended to pass his bow."

See also the Virgo, 7 Benedict, 495.
The Wm. Lindsay, L. R., 5 P. C., 338.
The Great Republic, 23 Wall., 20.

Especially is this rule applicable to the Comet in this case. Having herself committed a fault so monstrous and glaring as that found against her by the court below, having clothed herself with sin as with a garment, it is not for her to require extraordinary care or vigilance from the Manitoba, nor to ask for a contribution for the damages which she has suffered, and for which her own fault was a sufficient cause.

In the case of the *Bywell Castle*, *L. R.*, 4 P. D., 219, cited elsewhere in our brief, the Princess Alice suddenly starboarded, and brought herself across the Castle's bows. The Court of Appeals held the Princess Alice solely in fault. Brett, L. J., said: "I cannot, indeed, have a doubt that the Princess Alice was in the wrong. She was in the wrong for not keeping on the port side of the Bywell Castle, having once got there. If she was on the port side of the Bywell Castle, by her wrong act she put the Bywell Castle's captain into an extreme difficulty, in being close to, him showing him a green light on his port bow. The next question is whether the Bywell Castle, being put into that difficulty did what was wrong. But what is the wrong the court is bound to find she did? Not merely that she did a wrong thing, but that she was guilty of a want of that care or skill which she ought to have shown under such difficult circumstances. I am clearly of opinion that when one ship, by her wrongful act, suddenly puts another ship into a position of difficulty of this kind, we cannot expect the amount of skill as we should under other circumstances. The captains of ships are bound to show such skill as persons of their position with ordinary nerve, ought to show under the circumstances. But any court ought to make the very greatest allowance for a captain or pilot suddenly put into such difficult circumstances; and the court ought not, in fairness and justice to him, to require perfect nerve and presence of mind enabling him

to do the best thing possible. He was not called upon to give the order to stop and reverse until the other ship had done the wrong thing." *Cotton, L. J.*, said: "Even if the collision had not been unavoidable at the time the helm of the Bywell Castle was put hard-a-port, I should not have held that vessel liable. For, in my opinion, the sound rule is, that a man in charge of a vessel is not to be held guilty of negligence, or as contributing to an accident, if in a sudden emergency, caused by the default or negligence of another vessel, he does something which he might, under the circumstances as known to him, reasonably think proper; although those before whom the case comes for adjudication are, with a knowledge of all the facts, and with time to consider them, able to see that the course which he adopted was not, in fact, the best."

The Clement, 2 Curtis, 368.
Saltonstall vs. Stockton, Taney's Decisions, 21.
Taylor vs. Harwood, Taney's Decisions, 444.

To summarize the argument upon this point, we say that upon the facts found by the Circuit Judge, these vessels were not approaching upon convergent lines, nor were they approaching so as to involve risk of collision, until after they had come within four or five hundred feet of each other, when the sudden and unanticipated porting of the Comet took place; and this appears from these considerations:

1. That when they were from 1½ to 2 miles apart, the Comet's green light was only about three-fourths of a point on the Manitoba's starboard bow.

2. That instead of the angle at which that light appeared to the Manitoba lessening, as the vessel approached, it increased from three-fourths of a point to at least two points.

at the time when the vessels were from 400 to 500 feet apart.

3. That, had their courses been convergent, there would have been a gradual shutting in of the Comet's light; but the court finds that when the Comet had come within 400 or 500 feet of the Manitoba, she was then on a course which would have carried her at a distance of from 200 to 300 feet clear of the Manitoba, and it was only under the influence of a *hard-a-port* wheel that she threw herself across the Manitoba's course.

4. The Comet was struck on her port bow. Now, had she been approaching on a course convergent to that of the Manitoba, so as to involve risk of collision, she would, under her hard-a-port wheel, have passed clear of the Manitoba on the latter's port side before they collided; at all events, she would not have been struck on her bow.

V.

THE COURT ERRED IN FINDING AS A CONCLUSION OF LAW THAT THE MANITOBA WAS IN FAULT FOR NOT INDICATING HER COURSE BY HER WHISTLE.

The court (Record, p. 35) states that neither vessel sounded any signal of her whistle "indicating the side it intended to take." But this cannot be held to be a fault, so far as the Manitoba is concerned, because it is admitted in the libel, and found to be a fact, that the Manitoba was seen by the officers of the Comet while the vessels were yet several miles apart. Each vessel was aware of the presence of the other. Each saw the colored lights of the other. There was no fog, nor anything to obscure those lights or render their appearance ambignous.

The side which the Manitoba "intended to take" was indicated by her green light. If there was a competent lookout on the Comet, as the appellees claim, and as the Manitoba had the right to assume there was, the officers of the Comet must have known on which side she intended to pass. There is no claim in the libel that the officers of the Comet were deceived, because the Manitoba did not sound her whistle. No pretext was made by the libelant's counsel in the District Court, that the Manitoba was in fault in this respect. The only fault there claimed, in argument, against the Manitoba was the fact of her starboarding (Record, p. 18). And the only fault found against her by that court was not stopping and backing after the Comet had ported and showed her red light (Record, pp. 26–27). At most, the failure of the Manitoba to sound her whistle was only a *technical* fault. It did not cause or contribute to the collision. To condemn her owners to pay the entire value of their vessel and her pending freight as a contribution to the owners of the Comet on account of the collision, of which the misconduct of the Comet was the real and efficient cause, would be most inequitable and unjust. THE GREAT REPUBLIC 23 WALL. 240 — 33

That there is, in the judgment of those competent to judge, no necessity for a vessel to sound her whistle in order to indicate her presence or the direction in which she intended to pass, sufficiently appears from the fact that, by the new regulations adopted by Congress in 1885, it is expressly provided that the sounding of their whistles shall be *optional*.

See Act of 1885, Article 19.

Being themselves guilty of a fault which sufficiently accounts for the disaster, the appellees have no right to ask that the Manitoba be condemned, simply because the sounding of her whistle *might*, by a bare *possibility*, have prevented the commission of a wrongful act of porting by the Comet.

But another complete answer to the finding of the court upon this point, is the fact that the Manitoba is a Canadian vessel, owned by Canadians, and it is not shown that there is any statute or rule of Canada which requires steamers, when approaching each other on the open lake or sea on parallel lines, to sound their whistles. The rule which is invoked is simply the local rule adopted by the United States supervising inspectors, and is not applicable to the vessels of foreign countries.

The international sailing rules are applicable because they have been adopted by the governments of all, or nearly all, the great maritime powers; but this does not include the local regulations prescribed by the supervising inspectors.

In the *A. M. Hathaway*, 25 Fed. Rep., 926, it was held that the provisions of section 4234 of the Revised Statutes, which require all sailing vessels to exhibit a torch to an approaching vessel, were not applicable to a foreign vessel.

In the *Brig Belle*, 1 Benedict, 317, it was held that the act of Parliament prescribing the lights to be carried by a British vessel had no application to the equipment of a British ship when meeting a foreign ship on the high seas, and can furnish no rule by which the merits of a controversy growing out of a collision with a foreign vessel can be tested.

The same rules should apply to British and American vessels navigating the great lakes as would be applicable to such vessels when upon the ocean. By express treaty between the United States and Great Britain, 8 U. S. Statutes at Large, 117, it is provided that both countries shall have a free and common right to navigate these waters. Under this treaty the right of both nations to navigate the lakes is placed upon the same basis as the right to navigate the ocean. They constitute a common highway for the ships of both nations.

The Merchants' Shipping Act of England has been substantially re-enacted by the Dominion Parliament.

Statutes of Canada, 1880, Vol. 1, p. 236;
43 Victoria, Chap. 29.

The International rules of navigation which have been adopted by the governments of both countries, of course apply to the vessels of both, wherever they may be navigating waters common to both, whether they be the waters of the great lakes or the waters of the ocean.

The Manitoba, being a Canadian vessel, the law of her flag, or the general maritime law which may be taken as a part of the law of her flag, must govern her. And she is not to be condemned in this case unless she is shown to have violated that law, or some rule of good seamanship, which that law recognizes.

As already stated, there is nothing in the International Regulations, as they existed at the time when this collision occurred, nor in the general maritime law, which requires steamers to signal each other by sounding their whistles.

U. S. Rev. St., § 4233.
Statutes of Canada, 1868, p. 168, 31 Vic.

That the local law or regulation does not govern in cases of collision between ships of different nationalities upon the high seas, has been frequently decided.

In the *Chancellor*, 14 Moore, P. C., 202, a collision occurred on the Atlantic between an American and a British vessel, and it was held that the British statute did not apply to the American vessel, but that "the rule of the sea is that which must govern the case."

In the *Dumfries*, Swabey, 63, one of the vessels was a Danish vessel, and it was again held that the British law could not apply to her, but that the case must be decided by the general maritime law which is common to all nations.

In the *Scotia*, 14 Wall., 186, and in the *Belgenland*, 114 U. S., 369, the same rule is recognized. These cases hold substantially that the general maritime law respecting collisions can be modified by the adoption of new rules and regulations, only as such new rules and regulations are acquiesced in and adopted, by the mutual consent of maritime nations generally.

We submit that the Manitoba is not to be condemned without being found guilty of some specific fault. The simple fact that a collision ensued is not evidence of fault. And it is not sufficient to say in general terms that the Manitoba did not take "requisite precaution" to prevent the collision, but to condemn her, it should be shown in what particular she failed to do her duty. If she made a wrong maneuver, the court, before condemning her, ought to be able to point out what the wrong maneuver was; or if she failed in doing the right thing, the court ought to be able to say when and where such failure took place.

To say that she did not take "the requisite precaution" is simply to say, in general terms, that she was negligent. But this will not be sufficient to condemn her. Some specific act of negligence must be shown; some particular fault; some violation of the rules of good seamanship must be pointed out.

As was said in the case of the *City of Antwerp*, L. R., 2 P. C. Ap., 34, when a steamer is condemned for having omitted to do something which she ought to have done, it seems just to require clear proof of three things: 1st. That the thing omitted to be done was clearly within the power of the steamer to do. 2d. That if done it would in all probability have prevented the collision. 3d. That it was an act which would have occurred to any officer of competent skill and experience in command of the steamer.

We submit,

1st. That it was not within the power of the Manitoba to avoid the collision by stopping and reversing after the Comet had ported and showed her red light.

2d. That the sounding of her whistle would not, "in all probability," have prevented the collision.

3d. That the act of slackening speed as the vessels approached, with green light opposed to green light, was not one which would have occurred to any officer, of competent skill and experience, to perform.

And finally, that the Manitoba cannot, either upon equitable, or technical grounds, be held liable for this collision, and therefore, as against her, the decree of the court below should be reversed.

WM. A. MOORE,
F. H. CANFIELD,
Advocates for Appellants.

Supreme Court of the United States,

OCTOBER TERM, 1886.

No. 289.

JAMES H. BEATTY, ET AL., CLAIMANTS STEAMER MANITOBA,
Appellants,
vs.
HOWARD MELVILLE HANNA, ET AL., OWNERS PROPELLER COMET,
Appellees.
} *Appeal.*

BRIEF FOR APPELLEES.

H. L. TERRELL,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1886.

No. 289.

JAMES H. BEATTY ET, ALS., CLAIMANTS, STEAMER MANITOBA,
Appellants,

vs.

HOWARD MELVILLE HANNA, ET ALS., OWNERS, PROPELLER COMET,
Appellees.

} Appeal.

BRIEF FOR APPELLEES.

This case has been twice carefully heard, considered and decided by Courts presided over by able and painstaking Judges.

Being here for review on appeal, the ground to be covered is circumscribed by the Act of Congress, to the facts

as found and set forth in the record in the findings of the Circuit Court.

The particular matters of fault upon which both of the lower Courts based their decrees apportioning the damages, are set forth in two or three brief paragraphs of the findings of said Circuit Court.

In order that the Court may have a general understanding of the circumstances attending the collision which is the subject matter of this controversy, it is permitted to say that this collision occurred shortly after eight o'clock P. M., on the night of the 26th of August, 1875, about six miles below White Fish Point, in Lake Superior; that the night was clear and the sea was open and smooth; that according to the *Manitoba's* case, which was found by both lower Courts to be true, these said vessels made the lights of each other some fifteen minutes prior to the collision, being at that time from four to five miles apart, each making the bright and green light of the other from half to three-quarters of a point over the starboard bow; that said steamers were sailing on substantially parallel courses; that almost immediately after making each other's lights the *Comet* ported her helm and the *Manitoba* starboarded hers; that after running in this way a short time, it being evident to each that neither steamer was drawing away from the other, the *Comet* again ported; and that both said steamers kept on in this way until very shortly before the collision, when the *Comet* put her wheel hard a-port and instantly thereafter the *Manitoba* put her wheel hard a-starboard, following which the collision almost immediately occurred. That neither steamer prior to the collision slackened her speed nor reversed, nor stopped her engines, and that the *Manitoba's* signal to the engineer to reverse, which was the first signal given upon the part of the officers of the *Manitoba*, was given at the instant that the steamers collided.

Both steamers were held in fault for disobedience of sailing rule No. 21, which reads:

> "Every steam vessel when approaching another vessel so as to involve risk of "collision, shall slacken her speed, or if necessary, stop and reverse."

We come now to the findings of fact as set forth in the

record, and we call the attention of the Court to the following extracts therefrom, which cover all of the findings upon the subject referred to, viz.:

1. "The officers of each of the colliding vessels discovered soon after the "*Comet* had rounded White Fish Point, first the white, and soon thereafter the "green lights of each other, and they continued to approach each other on nearly "parallel opposite courses, each showing the other her white and green lights "only. Both vessels had the usual complement of officers and men. When they "were from one and a half to two miles apart the *Manitoba* had the *Comet's* green "light about three-quarters of a point on her starboard bow, the *Manitoba* then "starboarded her wheel half a point and continued her course until just before "the collision. In the meantime the *Comet* ported her wheel for a second time "half a point" (Rec., pp. 34, 35).

2. "Neither of said vessels sounded any signal of the whistle indicating the side "it intended or desired to take, *nor did either of them reverse its engine or slacken* "*its speed* until the collision was inevitable; but the *Manitoba* did, just before or "about the time it collided with the *Comet*, reverse the engine. *The fact that the* "*two vessels were moving on nearly parallel opposite, but strictly converging lines, was* "*manifest and apparent to the officers of both for some considerable time before the* "*Comet ported and ran across the Manitoba's course*, as hereinbefore stated, never- "theless, neither, as hereinbefore stated, slackened speed, changed its course, or "signaled its intentions. The relative courses of these vessels and the bearing of "their lights, and the manifest uncertainty as to the *Comet's* intentions, in con- "nection with all the surrounding facts, called for both the closest watch and the "highest degree of diligence on the part of both with reference to the movements "of the other, and it behooved those in charge of them to be prompt in availing "themselves of any resource to avoid, not only a collision, but the risk of such a "catastrophe. *If the requisite precautions had been observed by both, or by either of* "*said vessels, the collision, in the opinion of the Court, would not have happened*" (Rec., p. 35).

3. "That the *Manitoba* was in fault in ignoring the fact that the *Comet* was "approaching under a port wheel, *and that the courses of the two vessels were con-* "*vergent, and involved risk of collision*; and in failing to take proper precaution "in time to prevent the collision which afterwards occurred" (Rec., p. 36).

4. "That she was further in fault in not indicating her course by her whistle; "*and for not slowing up, and in failing to reverse her engine* until it was too late "to accomplish anything thereby" (Rec., p. 37).

The foregoing extracts cover the ground upon which the Circuit Court based its decree in this case, and we submit to the Court that they find conclusively:

FIRST.—That these steam vessels were meeting each other so as to involve risk of collision. Indeed, such is the literal language of the Circuit Court in extract three above cited, and that this fact was known to the

officers of both steamers for a considerable time prior to the collision, which is expressly found by the Court in extract two above cited, and is also perfectly apparent to the Court from the facts set forth in extract one, since it is found in said first extract that these steamers at the time they first sighted each other were running on substantially parallel opposite courses, and that immediately one of them ported and the other starboarded, making of necessity converging lines of progress, and that still later the *Comet* ported a second time, making the convergence still more apparent.

SECOND.—That neither of said steamers slackened its speed or stopped or reversed its engines until about the time the vessels actually collided.

This proposition has always been conceded in the argument, but was found affirmatively in extract two.

THIRD.—That the failure to slacken speed, or stop or reverse contributed to the collision. This fact appears from extracts two and four above set forth.

Stated consecutively, the findings of fact by the Circuit Court set forth in the record show, and such showing is conclusive for this Court, that these steamers were approaching each other so as to involve risk of collision, and that such approach and risk was apparent to the officers in command of each for many minutes prior to the collision. That notwithstanding they were so approaching, neither of said steamers slackened her speed, nor stopped nor reversed her engine, and that the failure to so slacken speed or stop or reverse engines, notwithstanding the original fault of the *Comet* in porting, contributed to the collision, and that if the engines of said steamers, or either of them, had been stopped or reversed no collision could have occurred.

It is submitted that these facts, behind which this Court cannot go, make a case falling literally within sailing Rule No. 21, and that the decree of the Circuit Court dividing the damages, should be affirmed. No repetition could make the facts found plainer or more forcible, and

no argument could make the conclusion of the Court thereon more sound or convincing.

We do not conceive that any authorities can be necessary to sustain the decree, but the case of *The Stanmore*, reported in 10 L. R., Prob. Div. 134, and the argument for reversal therein, were so exactly parallel that we here transcribe it in full:

[IN THE COURT OF APPEAL.]

"THE STANMORE."

"On appeal from a decision of the Rt. Hon. Sir James Hannen, whereby he "held both the *Cornwall* and the *Stanmore* to blame for a collision which took "place off the Yorkshire coast at about 12.30 A. M. on the ninth of September, "1884.

"The owners of the *Cornwall* appealed.

"The facts stated on behalf of the appellant and admitted by the respond- "ent's counsel were: that the night was thick with rain, and that the two vessels "were approaching each other on opposite courses, green light to green light; the "master of the *Cornwall* was on the watch and saw the green light and the mast- "head light of the *Stanmore* about half a mile distant on his starboard bow, and "they got broader on this bow. When the *Stanmore* had got about three points on "his starboard bow, the master of the *Cornwall* stated in his evidence, that he "could see by her lights that the *Stanmore* was altering her course, for the green "mast-head lights were getting more into line with each other, apparently show- "ing that the *Stanmore* was porting.

"The engines of the *Cornwall* had been stopped sometime previously on hear- "ing the whistle of a vessel, which proved to be the *Stanmore*. Afterwards the "master of the *Cornwall* saw the red light as well as the green light of the "*Stanmore*, and at once ordered his engines full speed astern. The green light "of the *Stanmore* was shut off, but again became visible, and then the engines of "the *Stanmore* were put full speed ahead, and the helm put hard a-starboard, but "the *Stanmore* struck, the *Cornwall* on the starboard side abaft the beam.

"*Sir W. Phillimore* and *Bucknill* for the appellants. The learned president "having found the *Stanmore* to blame has likewise held the *Cornwall* to blame for "not reversing sooner and thus infringing Article 18 (1) of the regulations for "preventing collisions at sea. This decision is wrong as regards the *Cornwall*, "for her master was not bound to reverse her engine when what he saw showed "that there was a probability that the *Stanmore* had ported, but when he saw "the red light of the *Stanmore* and a position of risk was indicated to him. "Not reversing engines of a vessel when there is a probability of danger is not "an infraction of Article 18 (1). The master was not bound to assume that the "*Stanmore* would continue to do wrong if she had begun to do so: *The Beryl* (2). "The master took time to confirm an opinion as to whether it is necessary to re- "verse: *The Emmy House* (3).

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(1) Art. 18. Every steamship, when approaching any other ship, so as to involve risk of collision, shall slacken her speed or stop and reverse, if necessary

(2) 9 P. D., 137.

(3) 9 P. D., 81.

" *Hall, Q. C.*, and *Roscoe* (*Barnes* with them) were not called on.

" *Brett, M. R.* In this case two vessels were meeting at night as nearly as " possible on opposite courses, and in such a position that they would pass star- " board to starboard, and therefore if each had kept her course there " was no danger of collision. One of them, the *Stanmore*, ported and " thus did wrong. But it is not sufficient in order to make the *Cornwall* " also to blame for this collision, to say that the *Stanmore* ported and had thereby " brought about danger of collision, and that the *Cornwall* should have taken " some action in consequence. It should be further shown that the officer on " watch on board the *Cornwall* ought to have been aware of the danger, and that " he took no proper steps to avoid it in order to be blameworthy. It was at a " little more than a quarter of a mile from the *Cornwall* that the *Stanmore* ported. " We have, therefore, put this question to our nautical assessors: ' If the *Stan-* " ' *more* ported at a little more than a quarter of a mile (being in the position " ' that she was) on the starboard bow of the *Cornwall*, did that produce risk of " ' collision?' They answer ' Yes.' Then the question arises: Was such risk of " collision so shown to the officer of the *Cornwall* that he ought in consequence to " have acted? He saw the white and green lights of the *Stanmore* coming more " into line and thus produced an effect on his mind. Then would the fact of the " white and green lights so coming into line indicate to the master of the *Stan-* " *more* as a sailor, that in all probability the *Stanmore* had ported. We put this " question in these words to our assessors and they answered ' Yes.' Therefore " we arrive at this result, which sailors must remember, that if in all probability " a vessel has done something which if in fact she has done it, will produce risk " of collision, a person who is aware of the fact of this probability of risk ought " to consider that there is a risk. I think that to insure the safety of ships, " which is the great object of these rules, when an officer is put in such a position " as I have pointed out, which was the position of the master of the *Cornwall*, he " ought to endeavor to avoid the risk by taking some action. That action is in- " dicated by Article 18 of the Regulations for preventing Collisions at Sea, and " therefore in the present case the master of the *Cornwall* should not only have " stopped her engines, but have reversed them when he saw the green and white " lights coming into line and not have waited until the red light appeared.

" *Baggalay* and *Bowen, L. JJ.* concurred; appeal dismissed."

The proctors for appellants who have argued this case in the Courts below, have persistently closed their eyes to the fact that for many minutes before the *Comet* suddenly put her helm hard a-port just prior to the collision, these steamers had been gradually drawing nearer each other upon converging lines, and that such gradual approach clearly indicated the risk of the collision, which in fact took place, and called for a slackening of speed and the stoppage and reversal of engines, and have argued the case as if the sudden porting of the wheel of the *Comet* just prior to the collision was the first intimation given to the *Manitoba* that any danger was to be apprehended.

A like proposition was made to the Court in the case of the *Stanmore*, and strenuously insisted on, and yet the Master of the Rolls had no difficulty in arriving at the conclusion that the *Cornwall* was at fault in not having observed a like gradual approach indicating risk of collision in that case.

It is impossible to conceive that in a clear night, in an open and smooth sea, two steamers, which had sighted each other when they were several miles apart, could finally collide at full speed, under any possible circumstances which would not render them both liable for a failure to slacken speed, and to stop and reverse their engines.

Respectfully submitted,

H. L. TERRELL,
Proctor for Appellees.

122 U.S. 163

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

EDWIN PARSONS, *Appellant,*

vs.

THE PHILADELPHIA AND READING RAILROAD COMPANY *et al.*

MOTION TO DISMISS APPEAL.

BRIEF FOR APPELLANT.

D. H. CHAMBERLAIN,
40 WALL STREET, NEW YORK.

FRANCIS A. LEWIS,
132 SOUTH 3D STREET, PHILADELPHIA,
Counsel for Appellant.

Donnelley's "Quick" Press, 148-150 Centre St., N. Y.

In the Supreme Court of the United States.

OCTOBER TERM, 1886.

EDWIN PARSONS,
Appellant,

AGAINST

THE PHILADELPHIA AND READING RAILROAD COMPANY ET AL.,
Appellees.

MOTION TO DISMISS APPEAL.

Statement.

This is a motion to dismiss an appeal from a decree of the Circuit Court of the United States for the Eastern District of Pennsylvania, filed March 7, 1887.

The decree is as follows:

"IN THE CIRCUIT COURT OF THE UNITED
"STATES,

"FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

"WILLIAM M. ROBINSON "VERSUS "THE PHILADELPHIA AND READING "RAILROAD COMPANY ET AL.	Of October Sessions 1886. No. 30.

"And now, this seventh day of March, 1887, the "above-entitled case having heretofore come on for "argument upon bill, answers and proofs, and having "been argued by counsel and duly considered, and it "appearing to the Court that the Philadelphia and "Reading Railroad Company did make default in the "payment of the coupons falling due January 1st, 1885, "and July 1st, 1885, upon the general mortgage bonds "of the said Railroad Company, secured by mortgage "dated July 1st, 1874, to the Fidelity Insurance, Trust "and Safe Deposit Company, trustee, and that the de-"fault specified still continues; and it further appearing "that the holders of more than one-tenth in amount of "the bonds issued under said mortgage and now out-"standing have in writing requested the said Fidelity "Insurance, Trust and Safe Deposit Company, trustee, "to enter upon the mortgaged property and sell the "same in accordance with the provisions of said mort-"gage, and to take such steps in fact and in law as may "be required for the purpose of enforcing the rights of "the bondholders under said morgage, and that, not-"withstanding the request in writing so made, the said "Fidelity Insurance, Trust and Safe Deposit Com-

" pany, trustee, did decline to regard said request, and
" did not enter upon and take possession of said mort-
" gaged premises, and did not perform the duties im-
" posed upon it by said mortgage;

" And the said case having been referred to George
" M. Dallas and James Pollock, Esquires, as Masters,
" to make report to the Court as by the order made Oc-
" tober 6th, 1886, doth more fully appear, and the said
" Masters' report having been filed, and all exceptions
" filed to the findings of the said Masters, except the
" first exception of the Philadelphia and Reading Rail-
" road Company after argument having been dismissed
" by the Court, the Court do find that said mortgage of
" July 1st, 1874, given by the Philadelphia and Read-
" ing Railroad Company to the Fidelity Insurance, Trust
" and Safe Deposit Company, trustee, is a lien upon
" the property in said mortgage described, including
" not only the railroad, leasehold estates, rolling stock,
" real estate and personal property in said mortgage
" described and then possessed by said Philadelphia
" and Reading Railroad Company, but upon all prop-
" erty, both real and personal, since acquired by said
" Railroad Company for use in connection with the rail-
" roads and franchises in said mortgage particularly de-
" scribed as in said Masters' report is fully set forth,
" and it appearing that the amount of bonds and cou-
" pons secured by said mortgage of July 1st, 1874, are
" as follows:

" Principal of six per cent. bonds.....	$10,686,000
" Coupons on same maturing Jan-	
" uary 1, 1885.....	$590,580
" Coupons on same maturing July	
" 1, 1885,.....	590,580
" Coupons on same maturing Jan-	
" uary 1, 1886.....	590,580
" Coupons on same maturing July	
" 1, 1886.....	590,580

" Coupons on same maturing Jan-
" uary 1, 1887.....$590,580
" Principal of seven per cent. bonds..... $5,000,000
" Coupons on same maturing Jan-
" uary 1, 1885 175,000
" Coupons on same maturing July
" 1, 1885..... 175,000
" Coupons on same maturing Jan-
" uary 1, 1886..... 175,000
" Coupons on same maturing July
" 1, 1886..... 175,000
" Coupons on same maturing Jan-
" uary 1, 1887..... 175,000

" and also general mortgage scrip bearing date July 1st,
" 1877, to the amount of $1,694,250, the payment of
" which scrip is secured by a deposit of the coupons
" upon said general mortgage bonds maturing from July
" 1st, 1877, to January 1st, 1880, inclusive, upon which
" scrip interest is payable from July 1st, 1886;

" The Court do order the defendant The Philadelphia
" and Reading Railroad Company to pay on or before
" the 7th day of June, 1887, the coupons upon said
" general mortgage bonds maturing upon the first days
" of January and July, 1885, January and July, 1886,
" and January, 1887, as hereinbefore recited, together
" with interest upon each coupon from the date of its
" maturity, and also general mortgage scrip of the
" amount of $1,694,250, with interest from July 1st,
" 1886, and in default of such payment the Court do
" order and decree that the defendants The Philadel-
" phia and Reading Railroad Company, Samuel W.
" Bell, trustee, the Pennsylvania Company for Insur-
" ances on Lives and Granting Annuities, trustees, and all
" persons claiming under them, be absolutely barred
" and foreclosed of and from all right and equity of re-
" demption in and to the premises in said mortgage
" described, and, in default of such payment as aforesaid,

" the Court do further order and decree the defendant, " The Fidelity Insurance, Trust and Safe Deposit Com- " pany, trustee in said mortgage mentioned, to sell " the railroads, estates, real and personal, corporate " rights and franchises and premises in said mortgage " mentioned at such time and place and in such manner " as the Court may hereafter determine and it is further " ordered that this cause be referred to the Masters " heretofore appointed with instructions to report to " the Court on or before the 10th day of July, 1887, " the extent and amount of all liens prior to said gen- " eral mortgage upon the properties thereby covered, " and also to report to the Court full and detailed " statements of the several properties, real and per- " sonal, of the Philadelphia and Reading Railroad " Company subject to the lien of said general mortgage " in accordance with the principles stated in the report " of the Masters heretofore filed and also to report what " liens if any are upon the several properties of the " said Philadelphia and Reading Railroad Company " and the Philadelphia and Reading Iron and Coal " Company junior to said general mortgage and the " order of their priority, and it is further ordered that " said Masters do prepare and report to the Court an " order of sale of said mortgaged properties, and form " of advertisement therefor."

The decree of October 6, 1886, referred to in the foregoing decree, is as follows :

" And now, October 6th, 1886, the above-entitled " case having come on for argument upon bill, answer " and proofs, and having been argued by counsel and " duly considered, and it appearing satisfactory to the " Court that the defendant The Philadelphia and Read- " ing Railroad Company did make default in the pay- " ment of the coupons and interest falling due January

" 1st, 1885, and July 1st, 1885, upon the general mort-
" gage bonds of said Railroad Company secured by the
" mortgage dated July 1, 1874, to the Fidelity Insur-
" ance, Trust and Safe Deposit Company, trustee, and
" that the default, occurring at the time specified, still
" continues ; and it further appearing satisfactory to
" the Court that the holders of more than one-tenth in
" amount of the bonds issued under said mortgage and
" now outstanding did, before the commencement of
" this suit, in writing request the said Fidelity Insur-
" ance, Trust and Safe Deposit Company, trustee, to
" enter upon the mortgaged property and sell the same,
" in accordance with the provisions of said mortgage
" and to take such steps, in fact and in law, as may be
" required for the purpose of enforcing the rights of the
" bondholders under said mortgage, and that, notwith-
" standing the request in writing so made, the said
" Fidelity Insurance, Trust and Safe Deposit Company,
" trustee, did decline to regard said request, and did
" not enter upon or take possession of said mortgaged
" premises, and did not perform the duty imposed upon
" it by said mortgage,

" Thereupon it is ordered, adjudged and decreed that
" the plaintiff is entitled to have a sale of the mort-
" gaged premises, in accordance with the provisions in
" said mortgage contained, upon the failure of the de-
" fendant to pay, within a time to be hereafter fixed,
" the amount of the bonds and coupons now outstand-
" ing entitled to the security of said mortgage ; and for
" the purpose of ascertaining the amount of the bonds
" and coupons now outstanding which are entitled to
" the security of the said mortgage.

" It is further ordered that this cause be referred to
" George M. Dallas and James Pollock, Esquires, as
" Masters, to ascertain and report within ninety days
" from the date of this decree, the amount due upon
" the bonds, principal and interest, which are entitled
" to the security of said mortgage ; and also to report

" what liens, if any, are prior to the bonds, or to any
" and what bonds secured by said mortgage; and also
" to ascertain and report the extent of the lien of the
" said mortgage upon the railroad, branches, leasehold
" interests, franchises and other property of the Phila-
" delphia and Reading Railroad Company, including
" not only the property owned by said company at the
" time of the execution of said mortgage, but also that
" which has since been acquired."

The suit in which the foregoing decrees were made, were brought by William M. Robinson, a citizen of the State of New York to obtain foreclosure and sale of the property embraced in a mortgage of the Philadelphia and Reading Railroad Company, dated July 1, 1874, and the bill specifically prayed relief as follows:

" I. That the said mortgage of the Philadelphia and
" Reading Railroad Company of July 1st, 1874, to se-
" cure the general mortgage loan of 1874 for $60,000,000,
" be decreed to be a lien upon the railroads, branches,
" leasehold interests, franchises, and all other property,
" real and personal, in said mortgage described.

" II. That the amount due upon the bonds, principal
" and interest, intended to be secured by the said
" mortgage of July 1st, 1874, be, at such time and in
" such manner as the Court shall direct, ascertained
" and determined.

" III. That a decree be entered directing the de-
" fendants The Philadelphia and Reading Railroad
" Company to pay what shall appear to be due upon
" taking such account by a short day, to be named by
" the Court.

" IV. That in default of such payment, it be decreed
" that the Philadelphia and Reading Railroad Com-
" pany, Samuel W. Bell, trustee, The Pennsylvania
" Company for Insurance on Lives and Granting An-
" nuities, trustees, and all persons claiming under them,

" be absolutely barred, and foreclosed of and from all " right and equity of redemption in and to the said " premises, and that a decree of this Court (in connec- " tion with such auxiliary decrees to be obtained in " other Courts, if such decrees should be deemed neces- " sary in order to vest a valid title to the whole mort- " gaged premises in the purchaser thereof) be entered " directing the Fidelity Insurance, Trust and Safe De- " posit Companies, trustee, as aforesaid, either them- " selves or by their agents, attorneys, or a receiver of " your Honorable Court, to enter upon take posses- " sion, and sell the mortgaged premises as in said " mortgage provided, the purchase money of such sales " to be paid and adjusted, or settled as the Court may " direct, appoint, or deem proper.

" V. That a Receiver or Receivers be appointed to " take custody of the property of the Philadelphia and " Reading Railroad Company and the Philadelphia and " Reading Coal and Iron Company, with such power " and authority, for the preservation and use of the " same, as to the Court shall seem best adapted to pro- " tect the interests of all persons having any interest " therein; or that the Receivers heretofore appointed " may be ordered and directed to take, receive, and " hold the said property and to continue the business " of the said corporation for the benefit and account " of the bondholders, secured by the said general mort- " gage.

" VI. Such other and further relief as the Court may " deem proper."

The present appellant was made a party to the suit by the following order made on the following petition :

"IN THE CIRCUIT COURT OF THE UNITED STATES.

"FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

"IN EQUITY.

"WILLIAM M. ROBINSON, A CITIZEN "OF THE STATE OF NEW YORK, "AGAINST "THE PHILADELPHIA AND READING "RAILROAD COMPANY ET AL.	October Sessions, 1885. No. 30.

"PETITION OF EDWIN PARSONS FOR LEAVE TO INTERVENE "AS PARTY PLAINTIFF, AND ORDER OF COURT GRANTING "SAID PETITION.

"*To the Honorable the Judges of said Court:*

"The Petition of Edwin Parsons, a citizen of the "State of New York, respectfully showeth :

"That to October Sessions, 1885, No. 30, of this "Court, one William M. Robinson, a citizen of the "State of New York, filed a Bill in Equity as well for "himself as for all other bondholders secured by the "mortgage therein recited, who agreeing to contribute "to the expense of said suit might become parties "thereto, against the parties therein and above named "for the foreclosure of the mortgage in said proceed-"ings recited.

"That your petitioner is a citizen of the State of New "York, and is the owner of bonds secured by said mort-"gage in said bill described to the amount of one hun-

"dred thousand dollars, and is desirous of being made
"a party plaintiff in said suit.

"He therefore prays for leave to intervene in said
"suit with the same force and effect as if he had orig-
"inally been made a party plaintiff therein.

"And he will ever pray.

"EDWIN PARSONS.

"CITY OF NEW YORK, ss.:

"EDWIN PARSONS, being duly sworn according to law,
"deposes and says, that the facts set forth in the fore-
"going petition are true to the best of his knowledge
"and belief.

EDWIN PARSONS.

"Sworn and subscribed before me this 13th day of February.

"EDWIN F. COREY,
"Notary Public,
"County of New York.

"ORDER OF COURT.

"And now, to wit, this 16th day of February, A. D.
"1886, on filing petition of Edwin Parsons for leave to
"intervene and to become a party plaintiff in this suit,
"on motion of Francis A. Lewis, Esq., for petitioner,
"the Court grant the prayer of the petitioner and
"hereby permit the said Edwin Parsons to become one
"of the parties plaintiff in this suit."

The petition for the present appeal and its allowance are as follows :

" IN THE CIRCUIT COURT OF THE UNITED
" STATES,

" FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

" IN EQUITY.

" WILLIAM M. ROBINSON ET AL. " AGAINST " THE PHILADELPHIA AND READING " RAILROAD COMPANY ET AL.	October Sessions, 1885. No. 30.

" *To the Honorable Judges of the above-entitled Court :*

" The petition of Edwin Parsons, a citizen of the " State of New York, and one of the complainants in " the above-entitled cause, respectfully shows to your " Honors :

" That by an order made in the above-entitled Court " on the 16th day of February, 1886, your petitioner " was, as the owner and holder in his own right of one " hundred thousand dollars' worth of the bonds of The " Philadelphia and Reading Railroad Company, se- " cured by its mortgage, dated June 1st, 1874, and com- " monly called the general mortgage of said company, " made a co-complainant with Wm. M. Robinson in " said above-entitled suit ;

" That the above-entitled Court has made an order " or decree of foreclosure and sale, dated March 7th, " 1887, in the above entitled cause at a Term of said " Court held at Philadelphia in said district for the Oc- " tober Sessions, 1885, that your petitioner is injured

" and aggrieved by said order and decree above-named,
" and desires to take an appeal therefrom to the Su-
" preme Court of the United States, and that the said
" appeal shall be and operate as a *supersedeas* upon said
" order and decree, and stay the execution thereof until
" said appeal shall be heard and determined in the said
" Supreme Court of the United States.

" Wherefore your petitioner prays such appeal to
" the Supreme Court of the United States from the or-
" der and decree of said Court above described, and
" that a citation may be issued as required by law.

" And your petitioner, as in duty bound, will ever
" pray, &c.

" DANIEL H. CHAMBERLAIN,
" FRANCIS A. LEWIS,
" Counsel for Edwin Parsons above-named.

" New York, March 16th, 1887.

" The appeal herein prayed for is allowed.

" JOSEPH P. BRADLEY,
" Associate Justice of Sup. Ct. U. S.

" March 19th, 1887.
" Filed 21st March, 1887."

POINTS.

I.

The decree here appealed from is a FINAL decree, and the appellant is entitled to appeal therefrom.

The interlocutory decree of Oct. 6, 1886, found (1) that the defendant company made default in the payment of its coupons falling due January 1 and July 1, 1885; (2) that the default "still continues;" (3) that the holders of the requisite amount of bonds had in writing re-

quested the trustee to enter upon the mortgaged estate and sell the same, &c., &c., and that the trustee had not complied with the request;

Thereupon, it was adjudged (1) that the plaintiff was "*entitled to have a sale of the mortgaged property upon the failure of the defendant company to pay the amount of the bonds and coupons within a time to be hereafter fixed;*" (2) that "in order to ascertain the amount of the bonds and coupons entitled to the security of the mortgage," it was referred to Masters to ascertain and report (1) the amount due on the *bonds, principal and interest;* (2) what liens are prior to said bonds; (3) the extent of the lien of the mortgage on the property of the defendant company, including property owned by the company at the date of the mortgage, and afterwards acquired.

The report of the Masters under this decree, filed January 6, 1887, contained findings on the several above specified points.

Thereupon the decree of March 7, 1887, was made and entered, wherein are recited (1) the findings and orders of the interlocutory decree of October 6, 1886; (2), the filing of the Masters' report under said decree; (3) the dismissal of all the exceptions to the Masters' report *except the first exception of the Philadelphia and Reading Railroad Company.*

Whereupon it is *found* (1) that the mortgage in suit "is a lien upon the property in said mortgage described," etc., both property owned at the date of the mortgage and that afterwards acquired, "as in said Masters' report is fully set forth;" (2) that the amount of bonds and coupons secured by said mortgage are:

Principal of 6 per cent. bonds	$19,686,000
Coupons past due on same	2,952,900
Principal of 7 per cent. bonds	5,000,000
Coupons past due on same	875,000
General Mortgage Scrip past due	1,694,250

And the Court *do order* the Company "*to pay on or before June 7, 1887, the coupons upon said general mortgage, as hereinbefore recited*, with interest upon each coupon from the date of its maturity, and also *general mortgage scrip of the amount of $1,694,250, with interest from July 1, 1886*"—an aggregate amount of $5,522,150.

"*And in default of such payment*," the Court *do order and decree* that the defendant company, the trustees, and all persons claiming under them be absolutely foreclosed, &c.

"And in default of such payment as aforesaid" the Court *do further order and decree* the defendant trustee to sell all the property, &c., "in said mortgage mentioned," at such time and place, &c., as the Court may hereafter determine.

And it is thereupon referred to Masters to report, on or before July 10th, 1887: (1) the extent and amount of prior liens; (2) detailed statements of the properties subject to the mortgage; (3) the junior liens; (4) an order of sale and form of advertisement therefor.

Summarily stated, we have here (1) an *interlocutory* decree which *finds* a default, a sufficient demand on the trustee and his refusal to enforce the mortgage security, and *decrees* that plaintiff is entitled to a sale upon failure of defendant to pay within a time to be fixed, and an order of reference; (2) a *final* decree which recites the findings and order of the *interlocutory* decree and adjudges the mortgage to be a lien on the property named in the report of the Masters, *finds the amount of the debt due, orders its payment* by a fixed time, and in default thereof *a sale of the mortgaged premises*, with a reference to Masters to report as to prior and junior liens, with detailed statements of the mortgaged property, and the form of an order of sale and advertisement therefor.

Such a decree is, under all the decisions of this Court, a *final* decree.

In *Ray vs. Law*, 3 Cranch, 178, it was decided that a decree for a sale under a mortgage upon a bill to foreclose is such a final decree as may be appealed from.

In *Whiting vs. Bank of the United States*, 13 Pet., 15, it was held that a decree of foreclosure and sale of mortgaged premises was a final decree and the defendant entitled to his appeal without waiting for the return and confirmation of the sale. And this decision is placed upon the ground, that the decree of foreclosure and sale was final upon the merits, and the ulterior proceedings but *a mode of executing the original decree.*

In *Forgay vs. Conrad*, 6 How., 201, a decree that certain deeds be set aside, that certain property be delivered up to complainant, that one of the defendants pay a sum of money to complainant and awarding execution for these several matters and then referring it to a Master to take an account of certain rents and profits, and an account of certain money and notes, and retaining the bill as to matters thus referred, for further decree, and dismissing it as to the rest of the bill, was held to be a final decree.

The Court calls special attention in this case to the propriety of announcing its opinion in an *interlocutory* decree, to be followed, upon the proper reference and report, by the final decree.

In the present case this practice was carefully followed. The decree of October 6, 1886, which was entered by Mr. Justice BRADLEY, announced the opinion of the Court on the whole merits—on all the issues raised and argued—and referred it to Masters to report the matters necessary to a *final* decree.

The decree of March 7, 1887, followed in all respects the lines of the interlocutory decree, and upon the report of the Masters decreed (1) the amount due ; (2) its payment ; (3) a sale on default.

What point affecting the merits of the cause is here left undetermined?

The later cases in this Court all confirm this view.

In *Wabash and Erie Canal vs. Beers*, 1 Black, 54, a decree adjudging that the defendant pay a certain sum into Court within a fixed time or in default thereof the Court will appoint a Receiver was held a final decree. TANEY, C. J., says: "This decree is final. It is decisive of the case made upon the record. It is positive and not alternative. It leaves no question of right between the parties open for future adjudication."

All these tests of finality are found in the present decree.

In *Bronson vs. Railroad Company*, 2 Black, 524, a suit was brought by the appellant to foreclose a mortgage of the defendant, and a decree was made ascertaining the sum due, principal and interest, decreeing the sale of the premises on a day certain unless the amount found due was theretofore paid.

Mr. Justice DAVIS said: "The litigation * * * is closed by this decree. *The object of the suit was to ascertain how much was due on the security of the mortgage, and to sell the property unless the amount was paid.* The Court did find what was due, and ordered a sale. The very purpose of the litigation was accomplished."

All this is directly applicable to the present decree.

In *Milw. & Minn. R. R. Co. vs. Soutter*, 2 Wall., 440, this Court had made a decree and sent its mandate to the Court below, on a bill to foreclose a mortgage. The Court below in intended compliance with the mandate found (1) the amount of interest due under the mortgage; and (2) directed the payment of it within a year; and (3) provided for an order of sale in case of default. As the reporter correctly says, "The amount of interest

was ascertained, and an order of sale provided for in case of default within one year; nothing more."

Upon appeal from this decree a motion was made to dismiss as not *final*, but this Court held it to be a *final* decree.

In *Thompson vs. Dean*, 7 Wall., 342, the decree below directed the transfer of certain stock by the defendants to the plaintiffs, and then ordered *an account as to the amount paid* and to be paid for the stock, and as to dividends to be credited as between the parties. A motion to dismiss was made in this Court, no counsel appearing against the motion. The sole question was whether this was a *final* decree. The Chief-Justice says: "The decree in the case determined the principal matter in controversy between the parties. And since the decree could not be changed except through a new and distinct proceeding, *it determined that matter finally*," and the motion was dismissed upon the authority of the cases adjudged here.

In *Grant vs. Phœnix Ins. Co.*, 106 U. S., 429, a motion was made here to dismiss an appeal from a decree in a suit to foreclose certain deeds of trust. The decree was in all respects similar to the interlocutory decree here of October 6, 1886. It merely held that there had been default and that there was a right of foreclosure, and referred it to the auditor to state the account, the amount due the plaintiff, and whether such amount was a lien or not.

The Chief-Justice says: "It has many times been decided that a decree of sale in a foreclosure suit, which settles all the rights of the parties and leaves nothing to be done but to make the sale and pay out the proceeds, is a final decree for the purposes of an appeal;" citing *Ray vs. Law*, 3 Cranch, *Whiting vs. Bank*, 13 Pet., *Bronson vs. Railroad*, 2 Black, and *Green vs. Fisk*, 103 U. S., 518, and several other cases.

Continuing, the Chief-Justice says: "The present decree is not final according to this rule. *It does not order a sale of the property.* * * * It is true the Court finds the amount due the appellee largely exceeds the value of the property, *but this is only as a foundation for the order appointing the Receiver.* * * * There is no order as in *Forgay vs. Conrad*, 6 How., 201, *Thomson vs. Dean*, 7 Wall., 342, and other cases of a like character, adjudging the property to belong absolutely to the appellee and ordering immediate delivery of possession."

In *St. L. I. M. & S. R. R. Co. vs. Southern Ex. Co.*, 108 U. S., 24, a motion was made to dismiss an appeal. The decree below held that it was the duty of the defendant to carry plaintiff's express matter at reasonable rates and fixed the rates. Supplementary proceedings under the decree were taken for the settlement of accounts, &c., but the Court held the decree *final*, reiterating the doctrine of *Grant vs. Phœnix*, 106 U. S.

In *Winthrop Iron Co. vs.* Meeker, 109 U. S. 180, a motion was made to dismiss an appeal from a decree in a suit brought to set aside certain proceedings at a meeting of the stockholders of a corporation and for a Receiver.

The decree below set aside the proceedings and appointed a Receiver, but reserved the cause for further directions as to carrying the decree into effect.

Held a *final* decree upon the authorities in this Court.

The statement of the law made in *Grant vs. Phœnix*, 106 U. S., 429, may be regarded as a succinct statement of the test of finality.

The only difficulty is in applying the rule to the great variety of cases.

We admit that a decree to be final and to support an appeal, *must terminate the litigation on its merits, so that*

if there should be an affirmance here the Court below would have nothing to do but to execute the decree already entered.

We say the present decree is such a decree. It was preceded by an *interlocutory* decree in which the Court announced its opinion as to the rights of the parties as matters of law, namely, *the right of the plaintiffs to a foreclosure and sale upon default of payment of the amount which should be found due.*

The decree of March 7, 1887, followed, by which it was decreed that *a certain specified sum was due* to the plaintiffs: *the payment of which sum was ordered;* and upon default thereof, *a sale was ordered* of the mortgaged property.

Apply strictly the test that "a final decree is one which disposes of the whole merits of the case." What were the merits here? What was the substance of the litigation?

It was whether the plaintiff was entitled to a decree foreclosing the defendant's rights in the property by reason of his default, and ordering a sale of the property to satisfy his debt.

This is completely done in this decree.

Apply the test that "nothing shall be left to be done except to carry the decree into execution."

This decree orders an absolute sale on failure to pay before a certain day the amount found due by the decree. Suppose this decree is affirmed here, what is to be done? Is anything left except after default to *make the sale, i. e., execute* the present order of sale?

What has the fact that a reference is ordered in the decree to do with its "finality?" What is the reference for? To ascertain three things: *first*, the prior liens; *second*, the junior liens; *third*, detailed statements of the property covered by the mortgage. What have these things to do with the decree except as means to its *execution?* Prior liens are of course first to be paid,

and junior liens are to be paid after the plaintiff's liens. What the amount o such liens may be is only important after the sale is made and the proceeds are ready for distribution.

To ascertain what are the precise properties covered by the mortgage is likewise only a step in the *execution* of the decree.

The case of *Railroad Company vs. Swasey*, 23 Wall., 405, is an apt illustration of what is *not* a final decree, and the tests of finality there laid down are the same as in the other cases which we have examined.

In that case the amount of the indebtedness was not found or stated. No sale was ordered. A lien was declared to exist in favor of the plaintiff on his equitable proportion of the stock, but such proportion was not ascertained. All these matters were referred to a Master for report.

Here each of the points which were wanting in Railroad vs. Swasey are found, (1) the amount of the debt, (2) the order of sale, (3) the property to be sold, to wit: the property covered and enumerated in the mortgage.

It should be noted that in *Railroad vs. Swasey* there was no formal mortgage in which the exact description of the mortgaged property was set forth. There was only a statutory lien created on the stock in question and its dividends, for the payment of certain of the State's bonds and certificates of indebtedness. Swasey had no specific, defined mortgage, like the mortgage of the bondholders here, and the Court had only decreed that, in case of the failure of the State to levy a tax sufficient to pay the past-due interest, "then *so much of the said stock* of the State in the said North Carolina Railroad Company, apportioned to the plaintiff and those he represents, *as may be necessary to pay off and discharge* said arrears of interest, shall be sold to the highest bidder for cash."

Plainly, this is not final, because there is no judicial

ascertainment, either *of the amount due* or *of the amount of the stock liable* for the claim of the plaintiff and those whom he represented.

In our case, these two judical acts are performed—the amount of the debt is fixed, and the whole property covered and specified in the mortgage is ordered to be sold.

The reference then made is merely *the mode of administration* adopted in execution of the decree.

II.

The appellant's interest in this appeal is not less than $5,000.

The fact that the appellant is an intervening complainant does not affect his rights on this appeal; he was made a plaintiff generally, and not for any specified or limited purpose. While it is true that his special contention has been in the Circuit Court in regard to certain general mortgage scrip so-called, yet he has a right to appeal from the whole decree, as he has done; and he has the right to support his appeal on any ground wherein his interests are injuriously affected. To seek to limit his appeal to his interest in reversing this decree in respect to $825,660 of general mortgage scrip, is wholly unwarranted by the record; *his appeal is against the whole decree.*

Admitting, for the sake of argument, that his interest in the scrip is not alone sufficient to meet the jurisdictional requirement, it appears by the record that the interlocutory decree of October 6, 1886, found *the bonds and coupons* to be in default and due according to the terms of the mortgage; and that the Master found

that the principal of the bonds, by the terms of the mortgage, had become due, and that both the principal and interest were then in default. No party plaintiff excepted to this finding, but the defendant company did except in these words:

"The Philadelphia and Reading Railroad Company, "one of the defendants in the above-entitled cause, ex- "cepts to the report of the Masters filed on the seventh "day of January, 1887, and assigns the following rea- "sons therefor:

"I. Because the learned Masters have erred in finding "that the principal of the bonds secured by the general "mortgage of the Philadelphia and Reading Railroad "Company, bearing date July 1st, 1874, amounting to "the sum of $24,686,000 is now due and payable."

This exception was sustained by the Court, as appears by the decree, and the decree adjudges only the past-due *interest* and the past-due *interest scrip* to be in default, and orders the sale in default of *that amount alone*, as found by the Masters. This appellant has the right to maintain his appeal on the ground of error in this part of the decree. He does appeal on this ground as well as on the ground of the error in including $825,660 of general mortgage scrip in the lien of the mortgage.

His interest in reversing this part of the decree is the amount of his bonds, $100,000. He claims, as was claimed in the bill and as was found by the interlocutory decree of October 6, 1886, and by the Masters' report, that he is entitled to the immediate payment of his bonds in full, principal and interest, whereas the decree appealed from decrees only the payment of his interest.

But if the general mortgage scrip were the appellant's only ground of appeal—as we have shown it is not—we urge that this case falls within the rule stated by this Court in *Market Co. vs. Hoffman*, 101 U. S., and that the appellant's right to appeal is not measured by *his*

individual interest in the disputed general mortgage scrip.

In *Market Co. vs. Hoffman*, a bill for injunction was originally filed by Hoffman alone, but was afterwards amended by admitting other complainants.

The Court says—"While it may be true if Hoffman was the sole complainant, the amount in controversy would not be sufficient to justify an appeal either by him or the company, the case is one of two hundred and six complainants suing jointly, *the decree is a single one in favor of them all* and in denial of the right claimed by the company, which is of far greater value than the sum which, by the act of Congress, is the limit below which an appeal is not allowed."

Here our decree is a single one, by which $825,660 of disputed liens are admitted to share in the lien of the general mortgage.

Farmers' Loan and Trust Co. vs. Waterman, 106 U. S., 265, is an authority in support of the right of this appellant to maintain this appeal.

In this case the Court, referring to *Ex parte Baltimore and Ohio R. R. Co.*, 106 U. S., 5, says: "If distinct causes of action in favor of distinct parties, though growing out of the same transaction, are joined in one suit and distinct decrees are rendered in favor of the several parties, these decrees cannot be joined to give us jurisdiction; *but if the controversy is about a matter in which several parties are interested collectively, under a common title*," &c., the appeal will lie.

The same doctrine is laid down in *Shields vs. Thomas*, 17 How., 3, which was a bill filed by several distributees, and by the decree the amount payable to each distributee was less than $2,000, but as the aggregate amount which the defendant was decreed to pay was more than $2,000, the appeal was sustained.

This case contains an examination of the authorities, and its principles have been ever since approved.

In our case, the matter in dispute is the whole sum

of $825,660, and this appellant has the right, regardless of the amount of his separate individual interest *in this sum*, to maintain this appeal.

It will be observed that the appellee who disputes our right to appeal holds only *$5,000 of bonds*—just *one-twentieth part of the holding of this appellant.* This appellant, as appears by the record, was made a party plaintiff " with the same force and effect as if he had originally been made a party plaintiff herein."

He is, therefore, the representative—just twenty times as much the representative as the appellee, Robinson—of *the whole body of bondholders;* and while it is true that no other bondholder by name joins with him, yet it is also true that no other bondholder—except Robinson, holding *five bonds*—has refused to join in this appeal, or joins in this motion.

It is respectfully submitted that the present motion should be denied.

D. H. CHAMBERLAIN,
40 Wall street, New York;
FRANCIS A. LEWIS,
132 South Third street, Philadelphia,
Counsel for Appellant.

122-112

IN THE

Supreme Court of the United States.

Appeal from the Circuit Court for the Eastern District of Pennsylvania.

Sur Appeal of Edwin Parsons,

IN

WILLIAM M. ROBINSON et al.

vs.

PHILADELPHIA AND READING RAILROAD COMPANY et al.

Brief for Appellees.

RICHARD C. DALE,
SAMUEL DICKSON,
Of Counsel.

ALLEN, LANE & SCOTT, PRINTERS, PHILADELPHIA.

In the Supreme Court of the United States.

Of October Sessions, 1887, No.

Sur Appeal of Edwin Parsons from a Decree of the Circuit Court of the United States for the Eastern District of Pennsylvania, entered March 7th, 1887, upon a bill filed by William M. Robinson vs. *The Philadelphia and Reading Railroad Company.*

Statement of the Material Matters Appearing of Record, Sur Motion to Dismiss the Appeal.

On November 18th, 1885, William M. Robinson, as the holder of General Mortgage Bonds of the Philadelphia and Reading Railroad Company to the amount of $5000, secured by mortgage bearing date July 1st, 1874, to the Fidelity Insurance, Trust and Safe Deposit Company, Trustee, filed a bill in equity against the Philadelphia and Reading Railroad Company and the Fidelity Insurance, Trust and Safe Deposit Company, the Pennsylvania Coal and Iron Company, the Pennsylvania Company for Insurances on Lives and Granting Annuities, Samuel W. Bell, and George deB. Keim, praying for the foreclosure of the mortgage securing his bonds, claiming equitable relief by reason of default made in the payment of interest and the failure of the trustee under the mortgage to do its duty as trustee in the premises. Thereafter, upon petition filed, Edwin Parsons, the appellant, was permitted to

intervene as a party complainant, by virtue of his holding $100,000 in amount of the bonds secured by the said mortgage. Answers were filed by the several defendants and proof taken, and thereafter, upon argument had on October 6th, 1886, a decree was entered in words following:—

"And now, October 6th, 1886, the above entitled case having come on for argument upon bill, answer, and proofs, and having been argued by counsel and duly considered, and it appearing satisfactory to the court that the defendant, the Philadelphia and Reading Railroad Company, did make default in the payment of the coupons and interest falling due January 1st, 1885, and July 1st, 1885, upon the General Mortgage Bonds of said Railroad Company secured by the mortgage dated July 1st, 1874, to the Fidelity Insurance, Trust and Safe Deposit Company, Trustee, and that the default, occurring at the time specified, still continues, and it further appearing satisfactorily to the court that the holders of more than one-tenth in amount of the bonds issued under said mortgage and now outstanding did, before the commencement of this suit, in writing request the said Fidelity Insurance, Trust and Safe Deposit Company, Trustee, to enter upon the mortgaged property and sell the same, in accordance with the provisions of said mortgage, and to take such steps, in fact and in law, as may be required for the purpose of enforcing the rights of the bondholders under said mortgage, and that, notwithstanding the request in writing so made, the said Fidelity Insurance, Trust and Safe Deposit Company, Trustee, did decline to regard said request, and did not enter upon or take possession of said mortgaged premises, and did not perform the duty imposed upon it by said mortgage,

"Thereupon it is ordered, adjudged, and decreed that the plaintiff is entitled to have a sale of the mortgaged premises, in accordance with the provisions in said mortgage contained, upon the failure of the defendant to pay, within a time to be hereafter fixed, the amount of the bonds and coupons now outstanding entitled to the security of the said mort-

"gage; and for the purpose of ascertaining the amount of the "bonds and coupons now outstanding which are entitled to "the security of the said mortgage,

"It is further ordered that this cause be referred to George "M. Dallas and James Pollock, Esquires, as Masters, to ascer- "tain and report within ninety days from the date of this de- "cree, the amount due upon the bonds, principal and interest, "which are entitled to the security of said mortgage; and "also to report what liens, if any, are prior to the bonds, or "to any and what bonds secured by said mortgage; and also "to ascertain and report the extent of the lien of the said "mortgage upon the railroad, branches, leasehold interests, "franchises, and other property of the Philadelphia and Read- "ing Railroad Company, including not only the property "owned by said company at the time of the execution of said "mortgage, but also that which has since been acquired."

In pursuance of the reference made to the Masters, proceedings were had before them in which it appeared that there were outstanding and secured by the mortgage of July 1st, 1874, bonds to the amount of $24,686,000. Claim was also made before the Masters that the holders of certain scrip, known as the General Mortgage Scrip, to the amount of $1,694,250 was secured by coupons formerly attached to the General Mortgage Bonds, and maturing July 1st, 1877, to July 1st, 1880, inclusive. As to $825,666 of this scrip, Edwin Parsons, as the holder of General Mortgage Bonds, claimed that the scrip had lost its lien. The report of the Masters upon this question was in these words:—

Second.—*The General Mortgage Scrip.*

The point which has been made on behalf of some of the bondholders under the General Mortgage, and also of the trustee under the Income Mortgage, is that to the extent of $825,660 of this scrip (Statement I., page 7), it has lost its right of lien under the mortgage, in consequence of certain dealings of the company with it.

The claim under this point is that the company purchased this $825,660 of scrip after its maturity, and when the time for its payment had not been extended, and that therefore, or even if it should be found that the purchase was made during a period of such extension, the lien with respect thereto (notes, pages 163–5), "became *ipso facto* extinguished."

With reference to this point and claim, we propose to give a brief explanatory history of the General Mortgage Scrip, and a statement of the material facts, to be followed by a consideration and disposition of the question as to whether its right to participate in the lien of the General Mortgage (which it is admitted had theretofore attached) was defeated in consequence of its purchase by the Railroad Company.

Shortly before the coupons maturing July 1st, 1877, upon the General Mortgage Bonds fell due, the holders of many of those bonds, in pursuance of an agreement purporting to have been made on their behalf (Book I., page 100), acquiesced in an arrangement that payment of one-half of the amount of the coupons maturing on the last-mentioned day, and to January 1st, 1880, should be postponed; that scrip bearing interest, and to mature July 1st, 1882, should be issued therefor; and that certain trustees should take and hold the coupons as collateral security for the payment of the scrip; and it was agreed, *inter alia*, that "all the rights and remedies incident to "the said coupons, and exercisable either by the holder thereof "or of the bonds to which they had belonged, shall remain "in full force, and may be exercised for the purpose only of "obtaining or enforcing payment of such scrip; and in order "thereto, the issue of the scrip shall not be deemed to be "either payment or satisfaction of any part of the coupons "in respect of which it was issued, unless and until such "scrip shall be bought by the company in respect of whose "coupons it is issued, or shall be paid off by the Reading "Company in cash."

The scrip now in question is part of that which was issued under this arrangement. In or about the month of December, 1882, the company not having paid the scrip when due, proposed to extend it for a further period of three years.

A large number of the holders accepted this proposal, but many of them did not, and it is the scrip included in this latter category with which we are now concerned. The company desired to subject it also to the agreement for extension; and, with the intention of effecting this object, it purchased this $825,660 thereof, *either* from its then owners, *or* from C. & H. Borie after they had themselves purchased it, and in pursuance of a previous agreement with that firm that the company would purchase from them all of such scrip which they would buy and extend.

That the company purchased this scrip is beyond doubt. That it was not intended that the purchase should operate as a payment or cancellation of it, is also clear. Whether —irrespective of intent—the legal result of the purchase was to extinguish the scrip, or at least its right of lien, is a contested question, which may depend upon whether it was bought by the company from C. & H. Borie after extension, as claimed by it, or from the previous holders without extension, as claimed by those who assert that it is not now entitled to the security of the General Mortgage. That is to say, if the purchase was made after extension, it was of obligations not finally matured; but if it was made when the extension had not been agreed upon (the original due date being past), the purchase was of fully matured obligations, which, being made by the debtor itself, would (it is contended) *a fortiori* terminate the right of lien.

The evidence abundantly shows that the Messrs. Borie were the brokers generally employed by the Railroad Company; that they entered this transaction upon their books as they would one of purchase by them for a customer in the ordinary course of their business; that they were paid the usual broker's commission; and that the company's officers and agents treated and referred to the business as, in substance, a purchase by the company through the firm mentioned. The true question, however, is as to the precise character of the particular transaction, and for its ascertainment there is evidence more satisfactory than any which we have referred to. The tendency to generalization has led

some of those connected with this matter, when not perceiving any reason for discrimination, to classify it with others of seemingly the same sort; but Mr. Gowen, then president of the company, and Mr. Beauveau Borie, when his attention was properly directed, concurred in their account of it. They have both testified that the agreement which was made and carried out, was with Messrs. C. & H. Borie, not as brokers but as principals, and that the bargain was that *they* would purchase the unextended scrip from the holders, and would then themselves extend it, and afterwards sell it to the company. In fact, C. & H. Borie did buy the scrip, extend it, and afterwards transfer it to the company, and were paid therefor the same sum for which they bought it, with interest and broker's commission added. Whether the dealing thus described constituted a purchase of the scrip, through C. & H. Borie, before its extension, or from that firm, after its extension, will be presently discussed in connection with the ultimate question as to whether or not the lien of the scrip under the mortgage has ceased to exist. Immediately upon, or soon after its purchase by the company, this scrip was pledged as security for floating debt, and still continues to be so pledged.

That this scrip is not entitled to the security of the General Mortgage has been contended upon three grounds: (*a.*) That it was purchased by the company after its maturity, and when its due date had not been extended. (Notes, page 165.) (*b.*) That the purchase, whether made before or after extension, was of merely temporary and auxiliary obligations, which it had been agreed would be extinguished by a purchase thereof, *at any time*, by the company. (Notes, page 167.) (*c.*) That the scrip certificates are, in substance and effect, new bonds, for a new principal, and as such, if to any extent invalid, upon grounds *a* and *b*, they constitute an overissue to that extent, under the clause of Article 3 of the General Mortgage with respect to progressive diminution of the amount of bonds to be issued. (Notes, page 95.)

(*a.*) It is quite apparent that the company desired to postpone, not to hasten, the time for payment of this scrip; tha

it did not purpose to cancel it, nor to defeat its right of lien; and that the course which it pursued, was advisedly adopted with the object of avoiding any possible legal consequence at variance with its intent. It was only because it wished to impress upon its purchase of the scrip the incidents of a purchase after extension, that it made the special agreement with C. & H. Borie; and the question now is as to whether that agreement and its performance have effected the proposed object. The contract was with the brokers of the company; but this is not material. Except that, as brokers, they possessed especial facilities for such business, and that from their previous employment by the company, it was natural for it to turn to them, the contract might have been made with any other persons as well. The company agreed to purchase what the vendors did not then own, and must themselves buy before they could deliver; but this is obviously unimportant. C. & H. Borie, after becoming the owners, were to agree to the extension of the scrip, and, therefore, its condition was to be changed in their hands from that of an over-due obligation to that of one not yet matured; but this certainly does not tend to show that the company was contracting to buy from the original holders, and not from C. & H. Borie. The company were to, and did, pay to C. & H. Borie, the sum paid by them for the same scrip, with interest and brokers' commission added, and in consideration of such payment, the scrip was to be, and was, delivered; but we do not think that the circumstance that the consideration was fixed at the original cost price and interest and commission, requires us, in view of all the facts, to find that the real transaction was merely one of employment of a broker to buy for the company's account. No doubt the price to be paid was fixed with reference to what would have been the charges if such had been the case. Unquestionably neither party contemplated the acquisition of any profit from the purchase and sale. The brokers were acting, evidently, as the friends of the company, and were satisfied to accept for their aid in the matter, the amount of the usual commission; but still, they did in fact agree to buy the scrip themselves and for themselves; and the

company's only agreement was to thereafter purchase it, upon and after performance of the condition precedent as to its extension. The parties were at liberty to make such contract as they desired, and the one which they did make was simply an agreement for the purchase of the scrip when extended. It was subsequently extended, and then, but not before, it became the duty of the company to take and pay for it, and it was accordingly delivered, and paid for by the company, or for its account.

We find that the scrip in question was not bought after it had become finally due, but during the running of a period for which the time of payment had previously been duly extended; and that, therefore, the purchase by the company was not of its matured, but of its unmatured obligations.

(*b.*) Upon the general proposition, that a corporation may, where such is the intent, purchase its current obligations, without thereby cancelling them, or affecting any security by way of lien, to which they are entitled, we have no doubt whatever. It has been expressly so decided;* and in each of the two Pennsylvania cases which have been called to our attention,† the mortgage (not such an one as this) was overdue, and the question was as to whether it had been satisfied, not as to whether its lien had become limited, or reduced in amount. This position, however, was not seriously attacked (notes, page 165)—the real contention being that, by virtue of certain provisions of the agreement under which the scrip was issued, the purchase thereof by the company, *at any time*, must be treated as payment and satisfaction. The provisions referred to are as follows:—.

"Article 14. Upon payment of the first half of any of the "said coupons in cash, the holders of such coupons shall not "be entitled to require payment of the other half in cash, but "such coupons shall be delivered up to the trustees, to be

*Mr. Chief Justice Waite, in Chaplain *vs.* R. R. Co., 8 Fed. Reporter, 118.

†Wilson *vs.* Murphy, 1 Ph. Rep., 203; and Lovrein *vs.* The Trust Company, 17 W. N. C., 487.

"held by them in trust for the owner for the time being of "the scrip issued in respect thereof, and as collateral security "for the payment of the said scrip; and all the rights and "remedies incident to the said coupons, and exercisable either "by the holder thereof or of the bonds to which they had be- "longed, shall remain in full force, and may be exercised for "the purpose only of obtaining or enforcing payment of such "scrip; and in order thereto the issue of the scrip shall not "be deemed to be either payment or satisfaction of any part "of the coupons in respect of which it was issued, unless and "until such scrip shall be bought by the company in respect "of whose coupons it is issued, or shall be paid off by the "Reading Company in cash."

"Article 15. The payment, either at maturity or upon being "drawn under Article 16, of any scrip issued in pursuance of "these presents, or its purchase by the Reading Company, or "the exchange of it by the holder for Income Mortgage "Bonds, shall be full payment and satisfaction by the Read- "ing Company of one-half of the coupons in respect whereof "such scrip was issued; and the trustees shall deliver over "to that company to be cancelled (or, in the case of the Per- "kiomen Bonds, to hold for its own account) the coupons "represented thereby, if then in their possession, or so soon "afterwards as they shall, on payment of the other half in "cash, receive the same."

It must be conceded that due effect should be given to these articles, unless some sufficient reason for disregarding them, can be found in something which has been done or agreed since the contract in which they are contained was made. It is true, that it was contemplated that the scrip would be paid at, or even before (Article 16) its maturity, and that no provision with respect to its non-payment was made, other than the remedy for default. It is also true that the scrip was not paid when due; that the remedy for default was not enforced; and that an agreement was made that the due day should be extended. This, however, was all that was done or agreed; and this, in our opinion, did not amount to a novation. The original contract remained unaffected, except only to the ex-

tent to which it had been expressly changed, and, therefore, the same effect precisely should now be given to these articles as ought to have been given to them if the present question had arisen before the extension of the scrip was agreed upon. Having carefully considered them in connection with the other pertinent portions of the instrument, we believe we have attained a correct understanding of their true intent and meaning. They were not introduced for the purpose of prohibiting the exercise by the company of its power under the law, as heretofore shown, to purchase its secured current obligations without affecting their validity or security. The rights of any others than the scripholders and the company were not considered; and, as to them, the subject was in contemplation in a relative and not merely abstract aspect. The matter which it was proposed to settle, was not simply the effect to result from purchase of the scrip—as to its payment or otherwise, but the consequences to attach to the *coupons* from any dealing by the company with the scrip. If the scrip were paid, the coupons would also be paid. If the scrip were purchased, with the intent, and therefore with the effect of payment, the same result was to follow as to the coupons. This, we think, was all that was meant. It was (Article 14) in order that the rights and remedies incident to the coupons might be preserved in aid of the scrip, that it was provided that the former should not be deemed to be paid unless the latter were bought or paid off by the company. The scrip, in other words, was to stand as representative of the coupons, and entitled to their security, so that whatever, but only whatever, would operate as payment of the one would be a satisfaction of the other. Now, a purchase of the coupons would not, unless so intended (*vide supra*), have been satisfaction, and, therefore, scrip bought, without such intent, was not payment. So also as to Article 15. The payment of the scrip, "or its purchase by the "Reading Company * * * shall be full payment of one-"half of the coupons in respect whereof such scrip was issued." Again we perceive (more plainly still if the whole article be read) that the subject is presented as a relative one, and that

the evident meaning is that anything which shall operate as a payment of the scrip, shall be payment of the coupons as well.

The contract has been invoked by those who claim that this scrip has lost its lien. Their contention has no other support. They necessarily stand upon it and must accept the same construction of its terms as would be right and proper if the parties to it were the contestants. It was made on behalf of the company and of couponholders who should become scripholders. Suppose, after the extension and subsequent purchase of the scrip by the company, a resale of it by the latter. Then, that the company's vendees were, appropriately and at its maturity, to proceed for its collection, and for enforcement of the rights incident to the coupons as pertaining to the scrip. Could the company successfully defend upon the ground that its purchase of the scrip, without intention to cancel it, had, under the contract, paid and satisfied it?* We believe it could not, and this, if correct, we think is conclusive of the present question.

We report that, in our opinion, the company, by purchasing this scrip before its ultimate maturity, did not cancel it, or affect its right to the security of the General Mortgage; and this notwithstanding the special agreement which has been set up to defeat that right.

(*c.*) It has not been contended (page 95) that the putting out of the scrip after its purchase by the company was equivalent to an over-issue of bonds, except to the extent to which such scrip might be held to have been extinguished by that purchase. Therefore nothing further remains for consideration. We have already found that it was not, to any extent, extinguished, and this disposes of the whole matter.

Finally as to this General Mortgage Scrip. It was, and remains, as we have before said, pledged for the company's floating debt. It is, therefore, outstanding for value. The holders, however, may not be entitled to its whole amount; for if the debts for which they hold it, shall be fully paid, they

*Claflin *vs.* R. R. Cy., 8 Fed. Rep., 122—*Supra*, page 23.

cannot justly claim anything more. Subject to this suggestion, it is entitled to the security of the General Mortgage.

To the report of the Masters, Edwin Parsons excepted, filing an exception in these words:—

"The learned Masters have erred in holding that General "Mortgage Scrip to the amount of $1,694,250 is entitled to "the security of the General Mortgage, whereas they should "have held that scrip to the amount only of $868,590 is "entitled to the security of said mortgage."

After argument had before the Hon. William McKennan, Circuit Judge, a decree was entered in these words:—

DECREE.

"And now, this seventh day of March, 1887, the above entitled case having heretofore come on for argument upon bill, answers, and proofs, and having been argued by counsel and duly considered, and it appearing to the court that the Philadelphia and Reading Railroad Company did make default in the payment of the coupons falling due January 1st, 1885, and July 1st, 1885, upon the General Mortgage Bonds of the said Railroad Company, secured by mortgage dated July 1st, 1874, to the Fidelity Insurance, Trust and Safe Deposit Company, trustee, and that the default specified still continues; and it further appearing that the holders of more than one-tenth in amount of the bonds issued under said mortgage and now outstanding have, in writing, requested the said Fidelity Insurance, Trust and Safe Deposit Company, trustee, to enter upon the mortgaged property and sell the same in accordance with the provisions of said mortgage, and to take such steps in fact and in law as may be required for the purpose of enforcing the rights of the bondholders under said mortgage, and that, notwithstanding the request in writing so made, the said Fidelity Insurance, Trust and Safe Deposit Company, trustee, did decline to regard said request, and did not enter upon and take possession of said mortgaged prem-

ises, and did not perform the duties imposed upon it by said mortgage.

"And the said case having been referred to George M. Dallas and James Pollock, Esqs., as Masters, to make report to the court as by the order made October 7th, 1886, doth more fully appear, and the said Masters' report having been filed, and all exceptions filed to the findings of the said Masters, except the first exception of the Philadelphia and Reading Railroad Company, after argument having been dismissed by the court, the court do find that said mortgage of July 1st, 1874, given by the Philadelphia and Reading Railroad Company to the Fidelity Insurance, Trust and Safe Deposit Company, trustee, is a lien upon the property in said mortgage described, including not only the railroad leasehold estates, rolling stock, real estate, and personal property in said mortgage described and then possessed by said Philadelphia and Reading Railroad Company, but upon all property, both real and personal, since acquired by said Railroad Company for use in connection with the railroads and franchises in said mortgage particulary described as in said Masters' report is fully set forth, and it appearing that the amount of bonds and coupons secured by said mortgage of July 1st, 1874, are as follows:—Principal of six per cent. bonds, $19,686,000;

Coupons on same, maturing January 1st, 1885, $590,580.
" " " July 1st, 1885, $590,580.
" " " January 1st, 1886, $590,580.
" " " July 1st, 1886, $590,580.
" " " January 1st, 1887, $590,580.

Principal of seven per cent. bonds, $5,000,000, and the coupons on same, maturing January 1st and July 1st, 1885, January 1st and July 1st, 1886, and January 1st, 1887—$175,000 each date.

"And also General Mortgage Scrip bearing date July 1st, 1887, to the amount of $1,694,250, the payment of which scrip is secured by a deposit of the coupons upon said General Mortgage Bonds, maturing from July 1st, 1877, to January 1st, 1880, inclusive, upon which scrip interest is payable from July 1st, 1886.

"The court do order the defendant, the Philadelphia and Reading Railroad Company, to pay on or before the seventh day of June, 1887, the coupons upon said General Mortgage Bonds maturing upon the first days of January and July, 1885; January and July, 1886; and January, 1887, as hereinbefore recited, together with interest upon each coupon from the date of its maturity, and also General Mortgage Scrip of the amount of $1,694,250, with interest from July 1st, 1886, and in default of such payment the court do order and decree that the defendants, the Philadelphia and Reading Railroad Company, Samuel W. Bell, trustee, the Pennsylvania Company for Insurances on Lives and Granting Annuities, trustees, and all persons claiming under them, be absolutely barred and foreclosed of and from all right and equity of redemption in and to the premises in said mortgage described, and, in default of such payment as aforesaid, the court do further order and decree the Fidelity Insurance, Trust and Safe Deposit Company, trustee in said mortgage mentioned, to sell the railroads, estates, real and personal, corporate rights and franchises, and premises in said mortgage mentioned, at such time and place and in such manner as the court may hereafter determine; and it is further ordered that this cause be referred to the Masters heretofore appointed, with instructions to report to the court on or before the tenth day of July, 1887, the extent and amount of all liens prior to said General Mortgage upon the properties thereby covered, and also to report to the court full and detailed statements of the several properties, real and personal, of the Philadelphia and Reading Railroad Company, subject to the lien of said General Mortgage, in accordance with the principles stated in the report of the Masters heretofore filed, and also to report what liens, if any, are upon said several properties, junior to said General Mortgage, and the order of their priority; and it is further ordered that said Masters prepare and report to the court an order of sale of said mortgaged properties and form of advertisement therefor."

From the decree entered by the Circuit Court this appeal is taken.

In the Supreme Court of the United States.

Sur Appeal of Edwin Parsons from a decree of the Circuit Court of the United States for the Eastern District of Pennsylvania, upon proceedings instituted by William M. Robinson vs. *The Philadelphia and Reading Railroad Company* et al.

And now, April 25th, 1887, William M. Robinson, the complainant below and appellee, moves the court to dismiss the appeal taken by Edwin Parsons, an intervening complainant, from the decree of the Circuit Court of the United States, entered on the seventh day of March, 1887, in proceedings instituted by William M. Robinson *vs.* The Philadelphia and Reading Railroad Company upon the ground,

First.—That the decree of March 7th, 1887, is not a final decree.

Second.—That the interest of the appellant in the subject-matter of the appeal is less than $5000.

BRIEF FOR THE APPELLEE.

1. The decree is not a final decree. Under well-settled rules relating to appeals, a decree to be final for the purposes of appeal must leave the case in such a condition that if there be an affirmance by this court, the court below will have nothing to do but to execute the decree it has already entered. This rule was recently reaffirmed in Dainese *vs.* Kendall, 119 U. S., 53. In Grant *vs.* Phœnix Insurance Company, 106 U. S., 429, the same rule was stated. Mr. Chief Justice Waite thus stated the opinion of the court:—

"The rule is well settled that a decree to be final within the meaning of that term as used in the acts of Congress giving this court jurisdiction on appeal must terminate the litigation of the parties on the merits of the case, so that, if there

should be an affirmance here the court below would have nothing to do but to execute the decree which it had already entered. This subject was considered at the present term in Bostwick *vs.* Brinkerhoff, *ante*, page 3, where a large number of cases are cited. It has also been many times decided that a decree of sale in a foreclosure suit which settles all the rights of the parties and leaves nothing to be done but to make the sale and pay out the proceeds, is a final decree for the purpose of the appeal. * * * * *

"The present decree is not final according to this rule. It does not order a sale of the property. It overrules the defense of the appellant as set forth in his cross-bill, and declares that the appellee is the holder and owner of the debt secured by the deeds of trust, but refers the case to an auditor to ascertain the amount due upon the debt, the amount due certain judgment and lien creditors, the existence and priorities of liens, and the claims for taxes."

In Railroad Company *vs.* Swasey, 23 Wall., 405, the Chief Justice delivered the opinion of the court in these words:—

"An appeal may be taken from a decree of foreclosure and sale when the rights of the parties have all been settled, and nothing remains to be done by the court but to make the sale and pay out the proceeds. This has long been settled. A sale in such a case is the execution of the decree. By means of it the rights of the parties as settled, are enforced, but to justify such a sale without consent, the amount due upon the debt must be determined, and the property to be sold ascertained and defined. Until this is done, the rights of the parties are not all settled. Final process for the collection of money cannot issue until the amount to be paid or collected by process, if not paid, has been adjudged. So, too, process for the sale of specific property cannot issue until the property to be sold has been judicially identified. Such adjudications require the action of the court. A reference to a master to ascertain and report the facts is not sufficient.

* * * * * *

"Thus far the court has done no more than declare that for the security of the payment of so much as is due, the plaintiff

and those he represents have a lien upon their equitable proportion of the stock, and that the lien may be enforced by sale if payment of the debt is not made. It has also declared its determination to state the amount of the indebtedness to the plaintiff and those he represents, and of their proportion of the securities pledged by the State. In this, as it seems to us, the court has acted upon the suggestions in Forgay *vs.* Conrad, 6 Howard, 201, and by an interlocutory order announced the opinion it had formed as to the rights of the parties and principles of the decree it would finally render, leaving the entry of the final decree in the form to be made when the amount due has been ascertained and the apportionment of the stock made. In this way the rights of all parties can be protected and no injustice done."

Following the method of procedure to which the court had thus given its sanction, the Circuit Court, in the present case, by its decree of March 7th, 1887, announced the opinion which it had formed upon the rights of the parties and the principles of the decree it would finally enter, and directed a reference to the masters, with instructions to report to the court before July 10th, 1887, the extent and amount of all liens prior to the General Mortgage upon the properties thereby covered, and also to report to the court full and detailed statements of the several properties, real and personal, of the Philadelphia and Reading Railroad Company, subject to the lien of said General Mortgage, in accordance with the principles stated in the report of the masters heretofore filed, and also to report what liens, if any, are upon said several properties, junior to said General Mortgage, and the order of their priority; and it is further ordered that said masters prepare and report to the court an order of sale of said mortgaged properties and form of advertisement therefor.

It will thus be seen that the decree entered is not a decree, upon the affirmance of which nothing remains to be done but its execution, but other matters remain to be reported on by the masters for the information of the court, and having received this information from the report which the masters are instructed to make on or before July 10th, the court will then

have before it such information as will enable it to make a final decree and order of sale.

It may be further remarked that the correctness of the proposition asserted by the appellee, that the decree of March 8th, 1887, is not to be regarded as a final decree for the purposes of this appeal when the nature of the controversy involved in the appeal is considered. The appellant is an intervening complainant. His exception to the report of the masters, the dismissal of which by the court is the basis of his appeal, was that the masters erred in recognizing the $825,660 of General Mortgage Scrip as entitled to the benefit of the lien of the General Mortgage. The appellant's interest in this controversy is that in case of a sale of the mortgaged premises for less than the debt, interest and costs secured by the General Mortgage, his dividend would thereby be reduced. It is only in the event of a sale and a subsequent distribution of the proceeds that the appellant has any interest. This circumstance shows clearly that it is in the order of sale and its provisions that the appellant is interested, and any decree prior to this final decree is one which does not affect in any wise his rights.

2. The appellant's interest in the controversy is less that $5000, and therefore the amount involved is insufficient to be made the subject of an appeal. As has already been stated, the appellant's appeal is directed against the admission to the benefit of the lien of the General Mortgage of $825,660 General Mortgage Scrip. The effect upon the rights of the appellant of the admission of this scrip to a share in the proceeds of a foreclosure sale is that the appellant's distributive share in case of the insufficiency of the fund to pay it in full will be *pro tanto* reduced. It appears in the decree that the amount of General Mortgage Bonds outstanding is $24,686,000. The appellant holds of these bonds to the amount of $100,000. He therefore is interested in the admission of the $825,660 General Mortgage Scrip to share in the distribution to the amount of one two-hundred-and-forty-sixth thereof. One two-hundred-and-forty-sixth of $825,660 is less than $3500. It is well settled that in appeals, co-parties cannot unite their interests in order to increase the amount involved so as to give

this court jurisdiction. Adams *vs.* Crittenden, 106 U. S., 576. So in Elgin *vs.* Marshall, 106 U. S., 578, judgment was rendered by the Circuit Court for $1660.75 against a town on interest coupons detached from the bonds which it had issued under a statute, the unconstitutionality of which it set up as a defense. The bonds were for a larger sum than $5000. It was held that the jurisdiction of this court did not attach because the amount actually involved was less than $5000. So, in Farmers' Loan and Trust Company *vs.* Waterman, 106 U. S., 265, it was held that parties to a suit cannot appeal from a decree therein rendered unless they are thereby affected, and where parties severally assert, in the same suit, separate causes of action, decrees which are rendered in favor of them respectively cannot be joined to render the amount involved sufficient to give this court jurisdiction. The case reaffirms *Ex parte* Baltimore and Ohio Railroad Company, 106 U. S., 5, where it was held that if distinct causes of action in favor of distinct parties, growing out of the same transaction, are joined in one suit, and distinct decrees are rendered in favor of the several parties, these decrees cannot be joined to give the court jurisdiction.

These cases are a conclusive answer to any suggestions that the aggregate interests of the General Mortgage Bondholders affected by the allowance of the General Mortgage Scrip to participation in the lien of the General Mortgage as a matter involving more than $5000. Edwin Parsons, the appellant, can only appeal from its allowance in so far as he himself is affected. No other General Mortgage Bondholder joins with him in his appeal, and the ground of his complaint relates to a matter which, while necessarily determined prior to the sale, is, in reality, a question of distribution in which each bondholder stands for himself in the right of bonds held by him to share in the proceeds of sale. For these reasons the appeal should be dismissed.

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